TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 802.

W. E. JOHNSON, T. E. BRENTS, AND H. F. COGGESHALL, APPELLANTS,

vs.

EDWIN GEARLDS, L. J. KRAMMER, FRED E. BRINKMAN, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED DECEMBER 4, 1913.

(23953.)

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INDEX.

1 United States District Court, District of Minnesota, Fourth Division.

EDWIN GEARLDS, L. J. KRAMER, FRED E. BRINKMAN, E. E. Gearlds, Albert Marshik, John A. Dalton, Edwin Fay, F. S. Lycan, John H. Sullivan, Harry Gunsalus, J. E. Maloy, and Tillie Larson, complainants. *v.* W. E. JOHNSON, T. E. BRENTS, AND H. F. COGGESHALL, defendants.	In equity No. 1007.

Pleas before the honorable the judges of the District Court of the United States of America, for the District of Minnesota, for the April term, A. D. 1912, of said court, held in the city of Minneapolis, in said district, in the year 1912.

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that on this 9th day of January, A. D. 1911, came the complainants above named by Marshall A. Spooner and E. E. McDonald, their attorneys, and filed in the clerk's office of said court their amended bill of complaint herein, which is in the words and figures following, to wit:

2 In the Circuit Court of the United States for the District of Minnesota, Fourth Division.

EDWIN GEARLDS, L. J. KRAMER, FRED E. BRINKMAN, E. E. Gearlds, Albert Marshik, John A. Dalton, Edwin Fay, F. S. Lycan, John H. Sullivan, Harry Gunsalus, J. E. Maloy, and Tillie Larson, complainants, *vs.* W. E. JOHNSON, T. E. BRENTS, AND H. F. COGGESHALL, defendants.	In equity.

To the honorable the judges of the Circuit Court of the United States for the District of Minnesota:

Edwin Gearlds, L. J. Kramer, Fred E. Brinkman, E. E. Gearlds, Albert Marshik, John A. Dalton, Edwin Fay, F. S. Lycan, John H. Sullivan, Harry Gunsalus, J. E. Maloy, and Tillie Larson, each a resident of the city of Bemidji, Beltrami County, in the State of Minnesota, and each a citizen of the State of Minnesota, bring this bill against W. E. Johnson, a citizen of the State of California; T. E. Brents, a citizen of the State of Oklahoma, and H. F. Coggeshall, a citizen of the State of New York, and thereupon your orators complain and say:

That your complainant, Edwin Gearlds, is a resident and citizen of the city of Bemidji, Beltrami County, Minnesota, and for more than two years continuously last past has been engaged at the
3 said city of Bemidji in the business of saloon keeper and in the selling and disposing at retail of spirituous, vinous, and

malt liquors at a known and established place of business, to wit, in a store building on lot eight (8) in block fourteen (14) in said city of Bemidji, and was and is authorized to conduct such business by both Federal and municipal authority, in that the said complainant duly paid to the internal revenue department of the United States Government the sum of twenty-five ($25) dollars as a special tax on the business of retail liquor dealer at the place hereinbefore specifically mentioned, and for the purpose of enabling the said complainant to so engage in such business at such place, and received from said Government a receipt for such special tax on the business of retail liquor dealer at and in such location, and the said receipt so issued to said complainant was issued to cover a period to include the period between and including July 1st, 1910, and June 21st, 1911, and said complainant was authorized, by reason of such payment and the issuance of the said receipt therefor, to engage in the business of retailing intoxicating liquors at such place during such period in quantities less than five (5) gallons at a time; that the said Edwin Gearlds also held at all such times, and now holds, a license issued on the authority of the State of Minnesota, and by the municipal council, and the officials of the said city of Bemidji authorizing and permitting the said Edwin Gearlds to conduct such saloon business and to sell and dispose of intoxicating liquors at retail, which said license was in full force at all the times hereinafter referred to.

That the complainant, L. J. Kramer, is a resident and citizen of the city of Bemidji, Beltrami County, Minnesota, and for more than two years continuously last past has been engaged, at the said city of Bemidji, in the business of saloon keeper, and in the selling and disposing at retail of spirituous, vinous, and malt liquors at a
4 known and established place of business, to wit: In a store building on lot fourteen in block fourteen (14) in said city of Bemidji, and was and is authorized to conduct such business by both Federal and municipal authority, in that the said complainant duly paid to the internal revenue department of the United States Government the sum of twenty-five ($25) dollars as a special tax on the business of retail liquor dealer at the place hereinbefore specifically mentioned, and for the purpose of enabling the said complainant to so engage in such business at such place, and received from said Government a receipt for such special tax on the business of retail liquor dealer at and in such location, and the said receipt so issued to said complainant was issued to cover a period to include the period between and including July 1st, 1910, and June 21st, 1911, and said complainant was authorized, by reason of such payment and the issuance of the said receipt therefor, to engage in the business of retailing intoxicating liquors at such place during such period in quantities less than five (5) gallons at a time; that the said L. J. Kramer also held at all such times, and now holds, a license issued on the authority of the State of Minnesota, and by the municipal council, and the officials of the said city of Bemidji authorizing and permitting the said L. J. Kramer to conduct a saloon

business, and to sell and dispose of intoxicating liquors at retail, which said license was in full force at all the times hereinafter referred to.

That the complainant, Fred E. Brinkman, is a resident and citizen of the city of Bemidji, Beltrami County, Minnesota, and for fourteen years continuously last past has been engaged, at the said city of Bemidji, in the business of saloon keeper, and in the selling and disposing at retail of spirituous, vinous, and malt liquors at a known and established place of business, to wit: In a store building on lot ten (10) in block seventeen (17) in said city of Bemidji, and was and is authorized to conduct such business by both Federal and municipal authority, in that the said complainant duly paid to the internal revenue department of the United States Government, the sum of twenty-five ($25) dollars as a special tax on the business of retail liquor dealer at the place hereinbefore specifically mentioned, and for the purpose of enabling the said complainant to so engage in such business at such place, and received from said Government a receipt for such special tax on the business of retail liquor dealer at and in such location, and the said receipt so issued to said complainant was issued to cover a period to include the period between and including July 1st, 1910, and June 21st, 1911, and said complainant was authorized, by reason of such payment and the issuance of the said receipt therefor, to engage in the business of retailing intoxicating liquors at such place and during such period in quantities less than five (5) gallons at a time; that the said Fred E. Brinkman also held at all such times, and now holds, a license issued on the authority of the State of Minnesota, and by the municipal council, and the officials of the said city of Bemidji, authorizing and permitting the said Fred E. Brinkman to conduct such saloon business, and to sell and dispose of intoxicating liquors at retail, which said license was in full force at all the times hereinafter referred to.

That the complainant, E. E. Gearlds, is a resident and citizen of the city of Bemidji, Beltrami County, Minnesota, and for more than three years continuously last past has been engaged, at the said city of Bemidji, in the business of saloon keeper, and in the selling and disposing at retail of spirituous, vinous, and malt liquors at a known and established place of business to wit: In a store building on lot eleven (11), in block fourteen (14), in said city of Bemidji, and was and is authorized to conduct such business by both Federal and municipal authority, in that the said complainant duly paid to the Internal Revenue Department of the United States Government, the sum of twenty-five ($25) dollars as a special tax on the business of retail liquor dealer at the place hereinbefore specifically mentioned, and for the purpose of enabling the said complainant to so engage in such business at such place, and received from said Government a receipt for such special tax on the business of retail liquor dealer at and in such location, and the said receipt so issued to said complainant was issued to cover a period to include

the period between and including July 1st, 1910, and June 21st, 1911, and said complainant was authorized, by reason of such payment and the issuance of the said receipt thereof, to engage in the business of retailing intoxicating liquors at such place during such period in quantities less than five (5) gallons at a time; that the said E. E. Gearlds also held at all such times, and now holds, a license issued on the authority of the State of Minnesota, and by the municipal council, and the officials of the said city of Bemidji, authorizing and permitting the said E. E. Gearlds to conduct such saloon business, and to sell and dispose of intoxicating liquors at retail, which said license was in full force at all the times hereinafter referred to.

That the said complainant, Albert Marshik, is a resident and citizen of the city of Bemidji, Beltrami County, Minnesota, and for more than one year continuously last past has been engaged, at the said city of Bemidji, in the business of saloon keeper, and in the selling and disposing at retail of spirituous, vinous, and malt liquors at a known and established place of business, to wit: In a store building on lot six (6), in block seventeen (17), in said city of Bemidji, and was and is authorized to conduct such business by both Federal and municipal authority, in that the said complainant duly paid to the internal revenue department of the United States Government the sum of twenty-five ($25) dollars as a special tax on the business of retail liquor dealer at the place hereinbefore specifically mentioned, and for the purpose of enabling the said com-
7 plainant to so engage in such business at such place, and received from said Government a receipt for such special tax on the business of retail liquor dealer at and in such location, and the said receipt so issued to said complainant was issued to cover a period to include the period between and including July 1st, 1910, and June 21st, 1911, and said complainant was authorized, by reason of such payment and the issuance of the said receipt therefor, to engage in the business of retailing intoxicating liquors at such place during such period in quantities less than five (5) gallons at a time; that the said Albert Marshik also held at all such times, and now holds, a license issued on the authority of the State of Minnesota and by the municipal council, and the officials of the said city of Bemidji, authorizing and permitting the said Albert Marshik to conduct a saloon business, and to sell and dispose of intoxicating liquors at retail, which said license was in full force at all the times hereinafter referred to.

That the complainant, John A. Dalton, is a resident and citizen of the city of Bemidji, Beltrami County, Minnesota, and for more than three years continuously last past has been engaged, at the said city of Bemidji, in the business of saloon keeper, and in the selling and disposing at retail of spirituous, vinous, and malt liquors at a known and established place of business, to wit: In a store building on lot one (1), block seventeen (17), in said city of Bemidji, and was and is authorized to conduct such business by both Federal and municipal

authority, in that the said complainant duly paid to the internal revenue department of the United States Government the sum of twenty-five ($25) dollars as a special tax on the business of retail liquor dealer at the place hereinbefore specifically mentioned, and for the purpose of enabling the said complainant to so engage in such business at such place, and received from said Government a receipt for such special tax on the business of retail liquor
8 dealer at and in such location, and the said receipt so issued to said complainant was issued to cover a period to include the period between and including July 1st, 1910, and June 21st, 1911, and said complainant was authorized, by reason of such payment and the issuance of the said receipt therefor, to engage in the business of retailing intoxicating liquors at such place during such period in quantities less than five (5) gallons at a time; that the said John A. Dalton also held at all such times, and now holds, a license issued on the authority of the State of Minnesota, and by the municipal council, and the officials of the said city of Bemidji authorizing and permitting the said John A. Dalton to conduct a saloon business, and to sell and dispose of intoxicating liquors at retail, which said license was in full force at all the times hereinafter referred to.

That the complainant, Edwin Fay, is a resident and citizen of the city of Bemidji, Beltrami County, Minnesota, and for more than one year continuously last past has been engaged, at said city of Bemidji, in the business of saloon keeper, and in the selling and disposing at retail of spirituous, vinous, and malt liquors at a known and established place of business, to wit: In a store building on lot eight (8), in block eighteen (18), in said city of Bemidji, and was and is authorized to conduct such business by both Federal and municipal authority, in that the said complainant duly paid to the internal revenue department of the United States Government the sum of twenty-five ($25) dollars as a special tax on the business of retail liquor dealer at the place hereinbefore specifically mentioned, and for the purpose of enabling the said complainant to so engage in such business at such place, and received from said Government a receipt for such special tax on the business of retail liquor dealer at and in such location, and the said receipt so issued to said complainant was issued to cover a period to include the period between and including July 1st, 1910, and June 21st, 1911, and said com-
9 plainant was authorized, by reason of such payment and the issuance of the said receipt therefor, to engage in the business of retailing intoxicating liquors at such place during such period in quantities less than five (5) gallons at a time; that the said Edwin Fay also held at all such times, and now holds, a license issued on the authority of the State of Minnesota, and by the municipal council, and the officials of the said city of Bemidji, authorizing and permitting the said Edwin Fay to conduct such saloon business, and to sell and dispose of intoxicating liquors at retail, which said license was in full force at all the times hereinafter referred to.

That the said complainant, F. S. Lycan, is a resident and citizen of the city of Bemidji, Beltrami County, Minnesota, and for more than four years last past has been engaged, at said city of Bemidji, in the business of operating and conducting a bar, in connection with and incidental to a hotel business conducted by said complainant in the Markham Hotel Building situated on lots thirteen (13) and fourteen (14) in block eighteen (18) in the original townsite of Bemidji, Minnesota, at which bar said complainant has been engaged in the selling and disposing at retail of spirituous, vinous, and malt liquors, and was and is authorized to conduct such business by both Federal and municipal authorities, in that the said complainant duly paid to the Internal Revenue Department of the United States Government the sum of twenty-five ($25) dollars as a special tax on the business of retail liquor dealer at the place hereinbefore specifically mentioned and for the purpose of enabling the said complainant to so engage in such business at such place, and received from said Government a receipt for such special tax on the business of retail liquor dealer at and in such location, and the said receipt so issued to said complainant was issued to cover a period to include the period between and including July 1st, 1910, and June 21st, 1911, and the said complainant was authorized, by reason of such payment and the issuance of the said receipt therefor, to engage in the business of retailing intoxicating liquors at such place during such period in quantities less than five (5) gallons at a time; that the said F. S. Lycan also held at all such times, and now holds, a license issued on the authority of the State of Minnesota, and by municipal council, and the officials of the said city of Bemidji authorizing and permitting the said F. S. Lycan to conduct such bar and to sell and dispose of intoxicating liquors at retail, which said license was in full force at all the times hereinafter referred to.

That the said complainant, John H. Sullivan, is a resident and citizen of the city of Bemidji, Beltrami County, Minnesota, and for more than five years continuously last past has been engaged at said city of Bemidji in the business of saloon keeper and in the selling and disposing at retail of spirituous, vinous, and malt liquors at a known and established place of business, to wit, in a store building on lot one (1) in block twenty-one in said city of Bemidji, and was and is authorized to conduct such business by both Federal and municipal authority, in that the said complainant duly paid to the Internal Revenue Department of the United States Government the sum of twenty-five ($25) dollars as a special tax on the business of retail liquor dealer at the place hereinbefore specifically mentioned, and for the purpose of enabling the said complainant to so engage in such business at such place, and received from said Government a receipt for such special tax on the business of retail liquor dealer at and in such location, and the said receipt so issued to said complainant was issued to cover a period to include the period between and including July 1st, 1910, and June 21st, 1911, and said complainant was authorized, by reason of such payment and the issuance of the said

receipt therefor, to engage in the business of retailing intoxicating liquors at such place during such period in quantities less than
11 five (5) gallons at a time; that the said John H. Sullivan also held at all such times, and now holds, a license issued on the authority of the State of Minnesota, and by the municipal council, and the officials of the said city of Bemidji authorizing and permitting the said John H. Sullivan to conduct such saloon business and to sell and dispose of intoxicating liquors at retail, which said license was in full force at all the times hereinafter referred to.

That the complainant, Harry Gunsalus, is a resident and citizen of the city of Bemidji, Beltrami County, Minnesota, and for more than one year continuously last past has been engaged, at said city of Bemidji, in the business of saloon keeper, and the selling and disposing at retail of spirituous, vinous, and malt liquors at a known and established place of business, to wit, in a store building on lot eleven (11) and twelve (12) in block (17) in said city of Bemidji, and was and is authorized to conduct such business by both Federal and municipal authority, in that the said complainant duly paid to the Internal Revenue Department of the United States Government the sum of twenty-five ($25) dollars as a special tax on the business of retail liquor dealer at the place hereinbefore specifically mentioned, and for the purpose of enabling the said complainant to so engage in such business at such place, and received from said Government a receipt for such special tax on the business of retail liquor dealer at and in such location, and the said receipt so issued to said complainant was issued to cover a period to include the period between and including July 1st, 1910, and June 21st, 1911, and said complainant was authorized, by reason of such payment and the issuance of the said receipt therefor, to engage in the business of retailing intoxicating liquors at such place during such period in quantities less than five (5) gallons at a time; that the said Harry Gunsalus also held at all such times, and now holds,
12 a license issued on the authority of the State of Minnesota, and by the municipal council, and the officials of the said city of Bemidji, authorizing and permitting the said Harry Gunsalus to conduct a saloon business, and to sell and dispose of intoxicating liquors at retail, which said license was in full force at all the times hereinafter referred to.

That the complainant, J. E. Maloy, is a resident and citizen of the city of Bemidji, Beltrami County, Minnesota, and for more than three years continuously last past has been engaged, at the said city of Bemidji, in the business of saloon keeper, and in the selling and disposing at retail of spirituous, vinous, and malt liquors at a known and established place of business, to wit, in a store building on lot (5) in block seventeen (17) in said city of Bemidji, and was and is authorized to conduct such business by both Federal and municipal authority, in that the said complainant duly paid to the Internal Revenue Department of the United States Government the sum of twenty-five ($25) dollars as a special tax on the business of

retail liquor dealer at the place hereinbefore specifically mentioned, and for the purpose of enabling the said complainant to so engage in such business at such place, and received from said Government a receipt for such special tax on the business of retail liquor dealer at and in such location, and the said receipt so issued to said complainant was issued to cover a period between and including July 1st, 1910, and June 21st, 1911, and the said complainant was authorized by reason of such payment and the issuance of the said receipt therefor, to engage in the business of retailing intoxicating liquors at such place during such period in quantities less than five (5) gallons at a time; that the said J. E. Maloy also held at all such times, and now holds, a license issued on the authority of the State of Minnesota, and by municipal council, and the officials of
13 the said city of Bemidji, authorizing and permitting the said J. E. Maloy to conduct a saloon business, and to sell and dispose of intoxicating liquors at retail, which said license was in full force at all the times hereinafter referred to.

That the complainant, Tillie Larson, is a resident and citizen of the city of Bemidji, Beltrami County, Minnesota, and for more than four years continuously last has been engaged, at the said city of Bemidji, in the business of saloon-keeper, and in the selling and disposing at retail of spirituous and malt liquors at a known and established place of business, to wit: lot eight (8) in block seventeen (17) in said city of Bemidji, and was and is authorized to conduct such business by both Federal and municipal authority, in that the said complainant duly paid to the internal revenue department of the United States Government, the sum of twenty-five ($25) dollars as a special tax on the business of retail liquor dealer at the place hereinbefore specifically mentioned, and for the purpose of enabling the said complainant to so engage in such business at such place, and received from said Government a receipt for such special tax on the business of retail liquor dealer at and in such location, and the said receipt so issued to said complainant was issued to cover a period to include the period between and including July 1st, 1910, and June 21st, 1911, and said complainant was authorized, by reason of such payment and the issuance of the said receipt therefor, to engage in the business of retailing intoxicating liquors at such place during such period in quantities less than five (5) gallons at a time; that the said Tillie Larson also held at all such times, and now holds, a license issued on the authority of the State of Minnesota, and by the municipal council, and the officials of the said city of Bemidji authorizing and permitting the said Tillie Larson to conduct a saloon business, and to sell and dispose of intoxicating liquors at retail, which said license was in full force at all the times hereinafter referred to.

That the value of the personal property and of the business of each of said complainants herein referred to, and which will be affected by the acts of the defendants herein mentioned, exceeds the sum of two thousand dollars ($2,000) in each instance, exclusive of interest and costs, and said complainants and each of them will be damaged

in an amount exceeding two thousand dollars ($2,000) each, exclusive of interest and costs, in case the defendants and each of them proceed to do the acts and things herein complained of, and the matter in dispute herein as respects each of said complainants, exclusive of interest and costs, exceeds the sum of two thousand dollars ($2,000).

14 Your orators further say that they each, in vending and disposing of liquors under their said licenses, have refrained from selling or disposing of any liquor to Indians or individuals of Indian blood, and each has, in every way and in all respects, complied with and observed all laws of the United States and of the State of Minnesota providing against the sale of liquor to Indians or enacted to prevent liquor coming into their possession, and each of your orators has endeavored to obey, and has obeyed, and complied with all laws regulating the sale of, and traffic in, such liquors.

Your orators each further say that each of them has built up and established a profitable and lucrative trade in his respective place of business, as hereinbefore described and set forth, and that each of said complainants will be affected by the acts of the defendants if done and carried out as by them threatened, and as hereinafter more particularly set forth, and that each of said complainants has a common interest in any restraining or injunctional order herein sought and in any such remedy as in this proceeding it is sought to have administered, and by joining in this action and in seeking the relief herein asked these complainants seek to avoid a multiplicity of actions and suits, and your orators further say that unless the said defendants are restrained and enjoined from doing the acts hereinafter set forth the established business of each of these complainants will be destroyed and ruined, and your orators are without any plain, adequate, or speedy remedy at law and can only have relief in a court of equity, and that irrevocable injury will be inflicted upon your orators, and each of them, in case this *this* honorable court does not enjoin and restrain the defendants, and each of them, from doing and performing the acts and things hereinafter referred to and which said defendants and each of them now threaten to do.

15 Your orators further say that Beltrami County, Minnesota, is now, and ever since the year 1897, has been a municipal corporation duly organized, created, and existing under and by virtue of the laws of the State of Minnesota, and forming a part of said State, and as such county has had within its territory, during all the time elapsing since its organization, the usual county, town, city, and village officers and the various forms of local government as provided for and prescribed by the laws of the State of Minnesota applying to organized counties and lesser political subdivisions; that the city of Bemidji, herein referred to, is the county seat of said Beltrami County, and is a municipal corporation organized under the laws of the State of Minnesota as a city and within its corporate limits contains a population of about seven thousand inhabitants, and in connection with other municipalities, to wit, villages under sepa-

rate organizations, but immediately adjacent to the territorial limits of said municipality and which latter, except for the fact that they exist under a separate and distinct governmental organization, are commercially a part of said city, constitutes a community which has a population of about 9,000 people; that the original form of government of the said Bemidji was that of a village form of government under the laws of the State of Minnesota and such village was organized under the laws of said State in the year 1898; that said city of Bemidji is, and since its original organization as a village has been, a growing and thrifty town increasing rapidly in population, and the country tributary thereto has had and enjoyed a like growth; that there are many blocks of substantial business buildings, largely brick and stone, in said city and hundreds of beautiful costly residences, nine churches of nine different denominations, four costly and expensive schoolhouses, a costly public library, a courthouse and other county property of the value of at least one hundred thousand dollars, ten hotels, an extensive system of water works, and an electric light plant; the city is situated on five lines of railroad, three of said lines being either transcontinental or parts of transcontinental
16 lines and said city is now recognized as the metropolis of the northern central portion of Minnesota; that within the immediate vicinity of the said city of Bemidji are many smaller flourishing and thrifty towns; that there are situated on the Minnesota & International Railway, which is a part of the Northern Pacific Railway system, north of said city of Bemidji and between said city and the boundary line between the United States and Canada, a distance of 108 miles, seventeen stations and towns; that there are situated on the Great Northern Railway, between said city of Bemidji and the Red River of the North, on the line of said railway, running east and west through said city of Bemidji, in a distance of 92 miles, fifteen thriving and important towns; that there are situated on said Great Northern Railroad, east of the said city of Bemidji and between said city of Bemidji and the city of Duluth, Minnesota, within a distance of 150 miles, twenty flourishing and thriving villages and towns; and that south of the said city of Bemidji, on said Northern Pacific line, between it and the city of Brainerd, which is practically, the geographical center of the State of Minnesota, and within 92 miles are sixteen important and thriving towns and stations; that within a distance of 87 miles of said city of Bemidji on the Sauk Center branch of the Great Northern Railroad there are twelve or more prominent, prosperous, thriving towns and villages; that on the Minneapolis, St. Paul & Sault Ste. Marie Railroad, bu[illegible]ecently built through the said city of Bemidji and which said line [illegible]as been projected as the main and direct line of said road between the city of Winnipeg, Canada, and the city of Chicago, Ill., and within a distance of 40 miles in either direction from said city of Bemidji on said line, there are at least twenty thriving and growing towns and villages; that the assessed value of real and personal property for the said city of Bemidji for the purpose of taxation is now the sum of 1,615,572

dollars; that the assessed valuation of real and personal property for the purpose of taxation in said Beltrami County is now the
17 sum of 6,881,175 dollars; that the assessed valuation of all the counties affected by such treaty of 1855 was, in the year 1909, $93,910,142; that many farms have been opened up in all directions from said city of Bemidji and the country adjacent thereto not already opened up is rapidly being taken up and converted into farms, and with the exception of the few scattering Indian reservations hereinafter referred to and there are no Indians residing outside of said reservations, the territory is populated with white people. And your orators further state that there are to-day within the limits of the erritory originally ceded to the United States under the provisions of the said treaty of 1855 less than two hundred Indians not now allottees; that there is no Indian reservation within twenty miles of the said city of Bemidji; that Indians very infrequently visit the city of Bemidji, and then only in small numbers, and for the purpose of selling berries during the berry season; and there are no Indian habitations within a range of twenty miles in any direction from the said city of Bemidji, and said city of Bemidji now is and for at least twelve years last past has been, as well as the territory surrounding the same, except said reservation, under municipal and State government and in all said territory, except said reservation, the jurisdiction of the State for all purposes of government has been full and complete and since the year 1867, as hereinafter more fully set forth, the Indian title to the territory embraced within the city limits of the said city of Bemidji and within the territory for a number of miles adjacent thereto has been completely extinguished.

Your orators further say that prior to the 22nd day of February, 1855, a tribe of Indians, known as Chippewa Indians, comprising the Mississippi, Pillager, and Lake Winnibegoshish bands of Chippewa Indians were in possession of the greater portion of the lands north of parallel 46 within the boundaries of the then Territory of Minnesota, and on said date the said bands of Indians entered into a treaty with the United States under the terms of which there was sold and conveyed to the said United States all the right, title, and interest in and to the lands then owned and claimed by the said bands of Indians in the Territory of Minnesota north of a line near to said 46th parallel of latitude, excepting, that by the second
18 article of said treaty there were set apart to the said Indians certain scattering reservations, none of which latter included any lands at any time within the municipal limits of the said city of Bemidji, nor any lands adjacent thereto, or within at least ten miles thereof, and under the terms of such treaty, the United States took over and became the owner and possessed of the lands now within the territorial limits of the said city of Bemidji, and all lands adjoining and contiguous thereto for many miles to the north, west, and south, and for at least ten miles to the east of where said

city is now located; that among other provisions of the said treaty there was included in the said treaty the following language:

"Article 7. The laws which have been or may be enacted by Congress, regulating trade and intercourse with the Indian tribes, to continue and be in force within the several reservations provided for herein; and those portions of said laws which prohibit the introduction, manufacture, use of, and traffic in ardent spirits, wines, or other liquors in the Indian country shall continue to be in force within the entire boundaries of the country herein ceded to the United States, until otherwise provided by Congress."

Your orators say that they are advised and believe, and accordingly state, that the defendants have done the acts hereinafter referred to, and are about to do and perform the things hereinafter complained of, claiming to derive their authority so to do, largely if not entirely, from the provisions contained in said article 7.

Your orators further state that these defendants, and especially the defendants, W. E. Johnson and T. E. Brents, acting in conjunction and in unison as special officers connected with the Indian Department as administered by the Interior Department of the United States Government, and claiming to act under authority conferred by said article 7 of said treaty aforesaid, and the provisions of sections 2139 and 2140 of the United States Statutes and amend-
19 ments thereof, have at divers and sundry towns and cities of northern Minnesota, and included within the territory ceded to the United States Government under the said treaty of February 22d, 1855, and which treaty was ratified March 3d, 1855, and proclaimed April 7th, 1855, including the city of Brainerd, the county seat of Crow Wing County in said State; the village of Walker, the county seat of Clearwater County in said State; the village of the county seat of Clearwater County in said State, the village of Grand Rapids, the county seat of Itasca County in said State; the village of Park Rapids, the county seat of Hubbard County in said State; the city of Detroit, the county seat of Becker county in said State; and in many other towns and villages in said territory, ceded as aforesaid, and in each of which places and over the inhabitants of which the jurisdiction of the State for all purposes of government was full and complete and generally and universally recognized so to be, entered upon private property where individuals and concerns were engaged in the sale of intoxicating liquors, and in each of which instances the persons and concerns so engaged held licenses from the United States Government to sell at retail, and also licenses from the county or municipal government to sell and dispose of such liquors under licenses authorized to be issued under the laws of the State of Minnesota, and in many instances destroyed such liquors in stock, and in other instances compelled the proprietors engaged in the business of vending such liquors to ship the same to other and remote portions of the said State and into territory beyond the limits of the land ceded by the said Chippewa Indians to the United States under said treaty, and then and there claimed and

asserted that the city of St. Paul was the nearest point into which intoxicating liquors might be shipped, and the nearest point in the State not coming within the provisions of some similar treaty provision against the introduction and presence of intoxicating liquor into and in Indian country, and ordered and directed the proprietors of such places to close up their places of business and to
20 desist from further engaging in such business at such places, and have threatened to arrest and prosecute such proprietors, under the claim that they are unlawfully selling and disposing of liquor in "the Indian country," contrary to the provisions of the said statutes and the said article 7 of said treaty, and the said defendants, and especially the said T. E. Brents and H. F. Coggeshall, acting jointly and in unison, did, on the 29th day of December, 1910, order and direct ——— other saloon keepers in the said city of Bemidji, holding licenses issued by the Federal Government to sell intoxicating liquors at retail in quantities less than five (5) gallons at a time, and holding municipal licenses issued under the authority of the State of Minnesota, to vend intoxicating liquors, to close up their places of business, and to desist further in the sale and disposition of such liquors in said city of Bemidji, and ordered and directed said saloon keepers to ship out such stocks of goods as they had on hand, and on such day and date, to wit, the said 9th day of December, 1910, these defendants, T. E. Brents and H. F. Coggeshall, acting jointly in the premises, and as your orators state and charge, in connection with the defendant, W. E. Johnson, and under his instructions, and in conjunction with the said Johnson, in the execution of his orders, to direct and command each of the several complainants herein to desist from further engaging in the business of selling and disposing of intoxicating liquors in the city of Bemidji, did then and there order and command each of the said complainants to close up his place of business and to remove and ship out his stock of liquors, of which each of the said complainants then had on hand a quantity, and did command each of these complainants to refrain from further engaging at said city of Bemidji in the business of selling and disposing of intoxicating liquors. That the defendants, and each of them, are now threatening, in case said complainants, or either of them, fail to observe
21 the order so given, to enter upon the premises of each of the said several complainants and to close up the business of said complainants, and each of them, and to destroy the stocks of liquor now in the possession of said complainants, and each of them, and the utensils and wares used and employed in the vending of the same, and to ruin and destroy the established business of each of the said complainants, and the said defendants, and each of them, further threaten in the event of the refusal of the said complainants, or either of them, to obey and recognize the orders so given to arrest and cause to be arrested said complainants, and each of

them, charged with the unlawful introduction, sale, and disposition of intoxicating liquors as in "the Indian country."

That during the fifty-five years elapsing since the making of said treaty of 1855, no effort has been made, either by Federal or State authority until within the last year, to prevent the introduction into, sale of, and traffic in intoxicating liquors in any of the lands ceded by the Chippewa Indians to the United States under said treaty of 1855, except inside of the limits of actual Indian reservations; and during all said period, and for more than thirty years last past, licenses have been granted by State and municipal authorities to engage in the sale and disposition of intoxicating liquors in all such territory outside of said reservations, and during all such time the United States Government has accepted and received, from persons desiring to engage in such business, special tax on the business of retail liquor dealer in all of said territory outside of said reservations and has issued its receipts therefor, which conferred upon the individuals to whom the same were issued the authority of the United States Government to sell and dispose of intoxicating liquors, in quantities of less than five (5) gallons at a time, and it has only been within the last several months that representatives and agents of the Indian Department have undertaken to prevent the
22 *the* introduction and sale of liquor in said country, or to interfere with, or molest, persons engaged in the sale and disposition of intoxicating liquor in any portion of said ceded territory.

And your orators reiterate that neither of the defendants is a citizen of the State of Minnesota, nor resident thereof, nor has any property therein; and these complainants further say, on information and belief that defendants are not financially responsible, and that any judgment that might be recovered against defendants, or either of them, in an action at law would not be collectible; that these complainants have no remedy against said defendants should they carry out such threats, as aforesaid, than may be afforded to these complainants in this equitable proceeding; and your orators say that they believe that unless restrained and enjoined by the court from so doing said defendants will proceed to carry out their threats so made, and will, under their assumption of authority so to do, close up the places of business of said complainants, and each of them, and will ruin and destroy the business of each of the said complainants, and will waste and destroy the stocks of liquor of the said several complainants, and the utensils and wares by them used in carrying on such business, and will attempt to carry out their threats to cause the arrest and prosecution of said complainants, and each of them, under a charge and charges to be lodged by said defendants, and each of them, against complainants, and each of them, of unlawfully selling and disposing of intoxicating liquors in "the Indian country," and of a violation of the provisions of sections 2139 and 2140 of the United States Statutes and amendments thereof.

And your orators further say, that after the making and proclamation of said treaty of 1855, as aforesaid, and on the 7th day of May, 1864, the said Chippewa Indians and the United States
23 entered into another treaty, which treaty was ratified on the 9th day of February, 1865, and was proclaimed on the 20th day of March, 1865, and under and by the terms of article 2 of which treaty, in consideration of the session to the United States Government by the said Chippewa Indians of certain reservations included within the provisions of the said treaty of 1855, and other considerations, there was set apart for the future home of the Chippewas of the Mississippi all the lands embraced within the following described boundaries (excepting the reservation made and described in the third clause of the second article of the said treaty of February 22d, 1855, for the Pillager and Lake Winnebagoshish bands): That is to say, beginning at a point one mile south of the most southerly point of Leach Lake and running thence in an easterly course to a point thence one mile south of the most southerly point of Goose Lake, thence due east to a point due south from the intersection of the Pokagomin reservation and the Mississippi River, thence on the dividing line between Deer River and lakes, Mashkordens River and lakes, until a point is reached north of the first-named river and lakes; thence in a direct line northwesterly to the outlet of Two Route Lake, then in a southwesterly direction to Turtle Lake, thence southwesterly to the head water of Rice River, thence northwesterly along the line of the Red Lake Reservation to *to* the mouth of Thief River, thence down the centre of the main channel of the Red Lake River to a point opposite the mouth of Black River, thence southeasterly in a direct line with the outlet of Rice Lake to a point due west from the place of beginning, thence to the place of beginning.

Your orators further say that the lands so set apart to the said Chippewas of the Mississippi contained all the territory now within the territorial limits of the city of Bemidji, and all the lands immediately adjacent thereto and distant several miles in all directions therefrom, and that by the terms of said treaty of 1864 the
24 Mississippi Band of Chippewa Indians became repossessed of, and the sole owners of, all the lands now within the city limits of the said city of Bemidji, and all the lands immediately adjacent thereto for a number of miles in each and every direction.

Your orators further say that again and on the 19th day of March, 1867, the Chippewas of the Mississippi, being the owners and in possession of the territory last referred to, and the United States Government again entered into another and new treaty which involved the said lands, and which treaty was ratified on the 8th day of April, 1867, and proclaimed on the 18th day of April, 1867, and which treaty was and is in its entirety as follows to wit:

TREATY WITH THE CHIPPEWAS OF THE MISSISSIPPI, 1867.

Articles of agreement made and concluded at Washington, D. C., this 19th day of March, A. D. 1867, between the United States, represented by Louis V. Bogy, special commissioner thereto appointed; William H. Watson and Joel B. Bassett, United States agent, and the Chippewas of the Mississippi, represented by Que-we-zance or Hole-in-the-day, Qui-we-shen-shis, Wau-bon-a-quot, Min-e-do-wob, Mijaw-ke-ke-shik, Shob-osk-kunk, Ka-gway-dosh, Me-no-ke-shik, Way-namee, and O-gub-ay-gwan-ay-aush.

Whereas by a certain treaty ratified March 20th, 1865, between the parties aforesaid, a certain tract of land was, by the second article thereof, reserved and set apart for a home for the said bands of Indians, and by other articles thereof provisions were made for certain moneys to be expended for agricultural improvements for the benefit of said bands; and whereas it has been found that the said reservation is not adapted for agricultural purposes for the use of such of the Indians as desire to devote themselves to such pursuits, while a portion of the bands desire to remain and occupy a part of the aforementioned reservation and to sell the remainder thereof to the United States: Now, therefore, it is agreed—

Article 1. The Chippewas of the Mississippi hereby cede to the United States all their lands in the State of Minnesota, secured to them by the second article of their treaty of March 20, 1865, excepting and reserving therefrom the tract bounded and described as follows, to wit: Commencing at a point on the Mississippi River, opposite the mouth of Wanoman River, as laid down on Sewall's map of Minnesota; thence due north to a point two miles further north than the most northerly point of Lake Winnibigoshish; thence due west to a point two miles west of the most westerly point of Cass Lake; thence south to Kabekona River; thence down said river to Leech Lake River; thence down the main channel of said river to its junction with the Mississippi River, and thence down the Mississippi to the place of beginning.

And there is further reserved for the said Chippewas out of the land now owned by them such portion of their western outlet as may upon location and survey be found to be within the reservation provided for in the next succeeding section.

Article 2. In order to provide a suitable farming region for the said bands there is hereby set apart for their use a tract of land, to be located in a square form as nearly as possible with lines corresponding to the Government surveys; which reservation shall include White Earth Lake and Rice Lake and contain thirty-six townships of land; and such portions of the tract herein provided for as shall be found upon actual survey to lie outside of the reservation set apart for the Chippewas of the Mississippi by the second article of the treaty of March 20, 1865, shall be received by them in part consideration for the cession of lands made by this agreement.

Article 3. In further consideration of the lands herein ceded, estimated to contain about two million acres, the United States agree to pay the following sums to wit: Five thousand dollars for the erection of school buildings upon the reservation provided for in the
26 second article; four thousand dollars each year for ten years, and as long as the President may deem necessary after the ratification of this treaty, for the support of a school or schools upon said reservation; ten thousand dollars for the erection of a sawmill, with gristmill attached, on said reservation; five thousand dollars to be expended in assisting in the erection of houses for such of the Indians as shall remove to said reservation.

Five thousand dollars, to be expended with the advice of the chiefs in the purchase of cattle, horses, and farming utensils, and in making such improvements as are necessary for opening farms upon said reservation.

Six thousand dollars each year for ten years, and as long thereafter as the President may deem proper, to be expended in promoting the progress of the people in agriculture and assisting them to become self-sustaining by giving aid to those who will labor.

Twelve hundred dollars each year for ten years for the support of a physician and three hundred each year for ten years for necessary medicines.

Ten thousand dollars to pay for provisions, clothing, or such other articles as the President may determine, to be paid to them immediately on their removal to their new reservation.

Article 4. No part of the annuities providing for, in this or any former treaty with the Chippewas of the Mississippi bands, shall be paid to any half-breed or mixed blood, except those who actually live with their people upon one of the reservations belonging to the Chippewa Indians.

Article 5. It is further agreed that the annuity of $1,000 a year which shall hereafter become due under the provisions of the third article of the treaty with the Chippewas of the Mississippi bands of August 2, 1845, shall be paid to the chief, Hole-in-the-day, and to his heirs, and there shall be set apart, by selections to be made
27 in their behalf and reported to the Interior Department by the agent, one-half section of land each upon the Gulf Lake reservation for Min-e-ge-shig and Truman A. Warren, who shall be entitled to patents for the same upon such selections being reported to the department.

Article 6. Upon the ratification of this treaty the Secretary of the Interior shall designate one or more persons who shall, in connection with the agent for the Chippewas in Minnesota, and such of their chiefs, parties to this agreement, as he may deem sufficient, proceed to locate, as near as may be, the reservation set apart by the second article hereof, and designate the places where improvements shall be made, and such portion of the improvements provided for in the fourth article of the Chippewa treaty of May 7, 1864, as

the agent may deem necessary and proper, with the approval of the Commissioner of Indian Affairs, may be made upon the new reservation, and the United States will pay the expenses of negotiating this treaty not to exceed ten thousand dollars.

Article 7. As soon as the location of the reservation set apart by the second article hereof shall have been approximately ascertained and reported to the office of Indian Affairs, the Secretary of the Interior shall cause the same to be surveyed in conformity to the system of Government surveys, and whenever, after such survey, any Indian of the bands parties hereto, either male or female, shall have ten acres of land under cultivation, such Indian shall be entitled to receive a certificate, showing him to be entitled to the forty acres of land, according to legal subdivision, containing the said ten acres, or the greater part thereof, and whenever such Indian shall have an additional ten acres under cultivation, he or she shall be entitled to a certificate for additional forty acres, and so on, until the full amount of one hundred and sixty acres may have been certified to any one Indian; and the land so held by any Indian shall be exempt from taxation and sale for debt and shall not be
28 alienated except with the approval of the Secretary of the Interior, and in no case to any person not a member of the Chippewa tribe.

Article 8. For the purpose of protecting and encouraging the Indians, parties to this treaty, in their efforts to become self-sustaining by means of agriculture, and the adoption of the habits of civilized life, it is hereby agreed that, in case of the commission by any of the Indians of crimes against life or property, the person charged with such crimes may be arrested, upon the demand of the agent, by the sheriff of the county of Minnesota in which said reservation may be located, and when so arrested may be tried, and if convicted, punished in the same manner as if he were not a member of an Indian tribe.

In testimony whereof, the parties aforementioned, respectively representing the United States and the said Chippewas of the Mississippi, have hereunto set their hands and seals the day and year first above written.

Ratified April 8, 1867.

Proclaimed April 18, 1867.

Your orators further state that the United States has carried out and performed all the obligations assumed by it under the terms of said treaty, and has fully performed the same on its part, and they submit that, under the terms and provisions of said treaty proclaimed on the 20th day of March, 1865, the lands now within the limits of the said city of Bemidji and adjacent thereto, became absolutely the lands of the Mississippi Band of Chippewa Indians; that said lands were afterward again ceded to the United States, under the provisions of the treaty proclaimed April 18th, 1867, which cessation was made without any restrictions or limitations whatever, and without

any provisions relative to the introduction of intoxicating liquors into or sale thereof in such territory; and that by reason thereof, and of the premises since the making of the said treaty of 1867, as aforesaid, the provisions of sections 2139 and 2140 of the United States statutes and amendments thereof, are not operative within said territory whereon stands the said city of Bemidji, and the same is not
29 Indian country within the meaning of said sections, and that said defendants, in attempting to prevent these complainants from further continuing their business hereinbefore referred to are, and each of them is, acting without authority.

And your orators further allege that in and by an act of Congress entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota," approved January 14, 1899, the President was authorized and directed to appoint three commissioners to negotiate with the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and relinquishment of all their title and interest in and to all their reservations in said State, except the White Earth and Red Lake Reservations, and to all and so much of these two reservations as in the judgment of said commissioners was not required to make the allotments provided for by said act. And it was further provided in and by said act that the acceptance and approval of the cession and relinquishment provided for therein by the President should operate as a complete extinguishment of the Indian title without any further act or ceremony whatsoever for the purposes and upon the terms provided in said act.

And your orators further aver that pursuant to the provisions of the said act the President duly appointed three commissioners to negotiate with the said band of Chippewa Indians for the cession and relinquishment of their said reservations, and that at divers times between the 8th day of July and the 12th day of November, 1889, agreements were entered into between said commissioners, on the part of the United States, and the several bands of Chippewa Indians, wherein and whereby the said Indians accepted, consented to, and ratified the said act of February 14, 1889, and each and all of the provisions thereof, and granted, ceded, relinquished, and conveyed to the United States all their right, title, and interest in and to all of the Grand Portage, Fond du Lac, Nett Lake, Deer Creek, Leech Lake, Winnibigoshish, and Chippewa Reservations, and in like manner ceded, relinquished, and conveyed to the United States all their right, title, and interest in and to four townships of the White Earth Reservation and the greater part of the Red Lake Reservation, and that said agreements and cessions were duly approved by the President on the 4th day of March, 1890.

30 And your orator further shows that upon the approval of the agreements and cessions above mentioned by the President the Indian title in and to all the lands thereby ceded was absolutely and completely extinguished, without any condition or limitation whatsoever, save only that the said lands were subject to disposal in

the manner and for the purposes provided in said act and not otherwise.

Your orators further say that at the time of the making of the treaty of 1855, hereinbefore referred to, the lands ceded by the Chippewa Indians under said treaty then were and constituted a vast wilderness, altogether uninhabited by any civilized people; that since the making of said treaty and the acquisition of the territory therein ceded within the limits of the State of Minnesota the country so ceded, with the exception of segregated portions thereof included within the reservations retained by the Indians under treaties between said Indians and the United States, has been largely developed, gradually at first, but with phenomenal rapidity within the last fifteen years, and with the exception of portions of such territory now included within the Red Lake and White Earth Reserves all of said lands have become populated with white and civilized people, and excepting such reservations, and all such territory has been opened up to settlement, and with the exception of a few square miles of land remote from railroads and streams all such territory is organized into political subdivisions under such organized form of government as is prescribed by the laws of the State of Minnesota, and in various communities scattered over said territory, except in very remote portions thereof, the degree of civilization is as advanced as in older portions of said State, and in the larger portion of said territory various branches of industry have been established and commercial interests have grown up and the circumstances existing at the time of the making of said treaty of 1855 have materially and completely changed; that according to the returns of the United States census of 1910 there is now in the counties affected by said treaty of 1855 a total white population of 382,191.

And your orators further say and represent that a large strip of territory completely surrounding the said Red Lake Reservation, the said strip of land being a part of the Red Lake Reservation ceded to the United States during the year 1890 under and pursuant to the provisions of the act of Congress of January 14, 1899, as here-
31 inbefore stated, is now, and is admitted by the officials of the United States Government to be, exempt from the provisions of any treaty relative to the introduction of intoxicating liquors into "the Indian country," and that the sale of intoxicating liquor in the territory between the said Red Lake Reservation and the said city of Bemidji and the territory immediately surrounding the same is permitted by the United States Government, and there is and exists a strip of land about fifteen miles in width into which it is lawful and so admitted by the Interior Department of the United States to introduce intoxicating liquors, and that in order to reach the said city of Bemidji it is necessary for such Indians as reside in said Red Lake Reservation to cross over the said strip of territory so open and recognized to be open to the sale and traffic of intoxicating liquors.

And may it please your honors to grant unto your orators a writ of subpoena of the United States of America issuing out of and

under the seal of this honorable court, directed to the said defendants W. E. Johnson, T. E. Brents, and H. F. Coggeshall, and thereby commanding them, and each of them, on a certain day to be therein named, and under a certain penalty to be and appear before this honorable court and then and there to answer, but not under oath—such oath being expressly waived—all and singular, and that each stand to perform and abide by such order, direction, and decree as may be made against them in the premises and as shall seem to your honors to be meet and agreeable to equity and good conscience.

And your orators pray that a temporary injunction may issue against the said defendants W. E. Johnson, T. E. Brents, and H. F. Coggeshall enjoining and restraining them, and each of them, and each of their agents, servants, employees, and deputies, and all persons claiming to act by, through, and under them, from going upon the respective premises of the said several complainants, particularly described herein, and from molesting or interferring with them, or either of them, in the conduct of their business as saloon-
32 keepers, or in conducting bars and in selling and disposing of vinous, spirituous, malt, and other intoxicating liquors, while engaged in said business, and in conducting the same with persons having no Indian blood, and under the pretense and claim that it is unlawful to sell and dispose of said liquors in the territory embraced within the limits of the said city of Bemidji, and from taking into their possession, or molesting, or interfering with, seizing or destroying any of the stock or stocks on hand, or in the possession of either of said complainants, or any of the personal property of said complainants used in connection with such business, either now situated upon said premises, or which complainants may hereafter acquire, place, or keep within any building on either of said premises.

May it please your honors to grant unto your orators a writ, or writs, of injunction, issuing out of your honorable court, or issued by one of your honors, according to the ordinary course and practice of this court in such cases made and provided, directing, commanding, enjoining, and restraining said defendants, their agents, servants, deputies, and all persons claiming to act for, thru, or under them, and each and every person whomsoever, from going upon the respective premises of said complainants particularly described herein, or to which they may remove in the said city, and from molesting or interfering with them, or either of them, in the conduct of their business as saloon keepers, or in conducting bars, and in selling and disposing of vinous, spirituous, malt, and other intoxicating liquors, while engaged in said business, and in conducting the same with persons having no Indian blood, and under the pretense and claim that it is unlawful to sell and dispose of said liquors in the territory embraced within the limits of the said city of Bemidji, and from taking into their possession, or molesting, or interfering with, seizing, or destroying any of the stock or stock on hand, or in the possession of either of the said complainants, or any of the per-

sonal property of said complainants used in connection with such business, whether as now situated upon said premises, or
33 which complainants may hereafter acquire, place, or keep within any building on either of said premises.

And your orators further pray that until said temporary injunction shall issue, your honors may issue a temporary restraining order against said defendants, and each of them, and their agents, servants, deputies, and all persons claiming to act, or acting for, thru, or under them, and in form and to the effect above prayed for; and may it please your honors to grant unto your orators such other and further relief as the facts and circumstances of the case warrant and require, and to this honorable court shall seem meet, and your orators, as in duty bound, will ever pray.

SPOONER & BROWN & E. E. MCDONALD,
Solicitors for Complainants.

34 STATE OF MINNESOTA, } ss.
COUNTY OF BELTRAMI. }

Edwin Gearlds and John A. Dalton, being each duly sworn according to law, severally depose and say: I am one of the complainants mentioned in the foregoing bill and have read the same, and the same is true of my own knowledge, except such matters as are therein stated on information and belief, and as to such matters I believe it to be true.

JOHN A. DALTON.
EDWIN GEARLDS.

Subscribed and sworn to before me this 19th day of December, 1910.

[SEAL.] E. E. MCDONALD,
Notary Public, Beltrami County, Minnesota.

My commission expires May 16th, 1917.
(Indorsed:) Filed Jan. 9, 1911.

35 And on the same day the following demurrer was filed of record in said cause, to wit:

36 In the Circuit Court of the United States, District of Minnesota, Fourth Division.

EDWIN GEARLDS ET AL., COMPLAINANTS,
v.
W. E. JOHNSON ET AL., DEFENDANTS.

The joint and several demurrer of the above named defendants to the bill of complaint of the above named complainants.

These defendants, by protestation, not confessing or acknowledging any or all of the matters or things in said bill of complaint con-

tained to be true in such manner and form as the same are therein set forth and alleged, demur to said bill, and for cause of demurrer show:

I. That it appears by the complainants' own showing by the said bill that they are not entitled to the relief prayed for by said bill against these defendants.

II. That it appears from said bill of complaint that this court has no jurisdiction to hear and determine this action.

III. That said bill of complaint is wholly without equity.

Wherefore, and for divers other good causes of demurrer appearing in said bill, these defendants demur thereto and humbly pray the judgment of this honorable court whether they shall be compelled to make further or any answer to said bill, and they humbly pray to be hence dismissed with their reasonable costs in their behalf sustained.

37 CHARLES C. HOUPT.
United States Attorney and Solicitor for Defendants.

STATE OF MINNESOTA,
COUNTY OF RAMSEY, } ss:

Charles C. Houpt, being first duly sworn, on his oath says that he is solicitor for defendants in the above entitled action, and that in his opinion the foregoing demurrer is well founded in point of law, and on behalf of defendants, says that same is not interposed for delay.

CHARLES C. HOUPT.

Subscribed and sworn to before me this 9th day of January, 1910.

NORBERT B. TYRRELL,
Notary Public, Ramsey County, Minn.

My commission expires Oct. 5, 1917.
Seal.)

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

CHARLES C. HOUPT,
United States Attorney and Solicitor for Defendants.

(Endorsed:) Filed Jan. 9th, 1911. Henry D. Lang, clerk, by Louise B. Trott, deputy.

38 And on the same day the following order overruling demurrer was entered of record in said cause, to-wit:

39 United States Circuit Court for the District of Minnesota. Third Division. Term minutes, December term, A. D. 1910. January 9th, 1911.

Monday morning, court opened pursuant to adjournment.

Present: Hon. Charles A. Willard, judge; Henry D. Lang, clerk, by Louise B. Trott, deputy.

EDWIN GEARLDS, ET AL.,
vs.
W. E. JOHNSON, ET AL. } No. 1007. Fourth Division.

This cause coming on to be heard upon the joint and several demurrer of the defendants to the amended bill of complaint of the complainant, the complainants appear by their solicitors, Messrs. M. A. Spooner and E. E. McDonald and Alfred H. Bright; the defendants by Charles C. Houpt, Esq.,

Whereupon, after hearing the arguments and statements of the solicitors for the respective parties, and being fully advised in the premises, upon due consideration thereof, it is by the court

Ordered: That the demurrer of the defendants to the amended bill of complaint herein be, and the same hereby is, overruled, and that a temporary injunction be granted, the defendant's counsel being allowed an exception to these orders.

A true record.

Attest:

HENRY D. LANG, *Clerk*,
By LOUISE B. TROTT, *Deputy*.

40 And on January 13th, 1911, the following oral opinion of the court overruling the demurrer and granting a temporary injunction was filed of record in said cause, to-wit:

41 United States Circuit Court, District of Minnesota, Fourth Division.

EDWIN GEARLDS, J. J. KRAMER, FRED E. BRINKman, E. E. Gearlds, Albert Karshik, John A. Dalton, Edwin S. Fay, F. S. Lycan, John H. Sullivan, Harry Gunsalus, J. E. Maloy, and Tillie Larson, complainants,
vs.
W. E. JOHNSON, T. E. BRENTS, AND H. F. COGgeshall, defendants. } In equity. No. 1007.

Demurrer to bill of complaint and motion for preliminary injunction, January 9th, 1911.

WILLARD, J. (orally).

Congress from time to time has passed various laws prohibiting the introduction of liquor into the Indian country. Among those is the act of 1834, the act of 1864, the act of 1892, and the act of 1897, and

the question at the bottom of this case is, of course, whether the United States Government can prohibit the introduction of intoxicating liquors into land covered by the treaty of 1855. If the
42 case depended alone upon these various acts of Congress, and particularly upon the last act, then no power could be found in the Government for the purpose of prohibiting such introduction.

In the case of Dick *v.* U. S., 208 U. S., 340, the court said, on page 352:

"If this case depended alone upon the Federal liquor statute forbidding the introduction of intoxicating drinks into the Indian country, we should feel obliged to adjudge that the trial court erred in not directing a verdict for the defendant; for that statute, when enacted, did not intend by the words "Indian country" to embrace any body of territory in which, at the time, the Indian title had been extinguished, and over which and over the inhabitants of which (as was the case of Culdesac) the jurisdiction of the State, for all purposes of government, was full and complete."

The situation at Bemidji is the same as it was at Culdesac; it is not within the Indian country and consequently the statute alone would not justify any prosecution for the introduction of liquor into that country. The power of the Government must rest, as it rested in the case of Dick *v.* The U. S., upon a treaty; and the treaty invoked is the treaty with the Chippewa Indians of 1855, which is in the 10th Statutes at Large, 1165. Article 7 of that treaty is as follows:

"Article VII. The laws which have been or may be enacted by Congress, regulating trade and intercourse with the Indian tribes, to continue and be in force within and upon the several reservations provided for herein; and those portions of said laws which prohibit the introduction, manufacture, use of, and traffic in ardent spirits, wines, or other liquors in the Indian country, shall continue and be in force, within the entire boundaries of the country herein ceded to the United States, until otherwise provided by Congress."

The first and most important case to be considered is the U. S. *v.* 43 Gallons of Whiskey, 93 U. S., 188. That case in-
43 volved a treaty made with the Chippewa Indians in 1863 by which they ceded certain lands in Minnesota to the United States. It contained a clause similar to Article 7 of the treaty of 1855. The court said there, at page 194:

"It was contended, among other things, that the sale of liquor to an Indian, or any other person within the county, was a matter of State regulation, with which Congress had nothing to do. But this court held that the power to regulate commerce with the Indian tribes was, in its nature, general, and not confined to any locality; that its existence necessarily implied the right to exercise it, whenever there was a subject to act upon, although within the limits of a

State, and that it extended to the regulation of commerce with the individual members of such tribes."

The court further said at page 195:

"As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the Government, Congress has the power to say with whom, and on what terms, they shall deal, and what articles shall be contraband. If liquor is injurious to them inside of a reservation, it is equally so outside of it; and why can not Congress forbid its introduction into a place near by, which they would be likely to frequent?"

And at page 196:

"The power to define originally the "Indian country" within which the unlicensed introduction and sale of liquors were prohibited, necessarily includes that of enlarging the prohibited boundaries, whenever, in the opinion of Congress, the interests of Indian intercourse and trade will be best subserved."

And finally at page 198:

"If this result can be thus obtained, surely the Federal Government may, in the exercise of its acknowledged power to treat with Indians, make the provision in question, coming, as it fairly does, within the clause relating to the regulation of commerce."

This case has been referred to in subsequent decisions.

In the case of Dick v. The U. S., before mentioned, there
44 was under consideration a treaty with the Indians which prohibited for the period of 25 years the introduction of intoxicating liquor into lands then ceded by them. The court in delivering the opinion repeatedly referred to that circumstance, and seemed to indicate that the period of prohibition was important. In speaking of the case of U. S. v. 43 Gallons of Whiskey, the court said at page 359:

"In view of some contentions of counsel and of certain general observations in the case of Forty three Gallons of Whiskey, above cited, not necessary to the decision of that case, but upon which some stress has been laid, it is well to add that we do not mean, by anything now said, to indicate what, in our judgment, is the full scope of the treaty-making power of Congress nor how far, if at all, a treaty may permanently displace valid State laws or regulations."

The latest case to which my attention has been called is U. S. v. Sutton, 215 U. S., 291. There a prosecution for the introduction of liquor into Indian country was upheld; but it appeared that the "Indian country" there in question was a tract of land which had been allotted to an Indian, the title to which was still held in trust for him by the United States.

It may be argued that the authority of the case of U. S. v. 43 Gallons of Whisky has been somewhat qualified by what was said in the case of Dick v. U. S., and by the fact that the case of U. S. v. Sutton supra was put upon somewhat different grounds. It was nevertheless in the first case distinctly held that Congress had the

power not only to prohibit the introduction of liquor into an Indian reservation, into what was in fact Indian country, but also
45 to prohibit the introduction of liquor into adjoining country, not Indian country, but within the limits of an organized State. So far as this court is concerned, that statement must be considered as binding upon it. The law must be considered as settled that Congress has the power to prohibit the introduction of liquor into lands not Indian country, but adjoining it, within the limits of a State.

But when this is admitted and conceded the present case is not yet, in my judgment, resolved. The question here presented is not a question as to the power of Congress. As I have already said, it is within the power of Congress, after a State has been admitted to the Union, to prohibit the introduction of liquor into not only Indian country but into the adjoining country. That it had that power before the State was admitted and while the land was within the limits of a territory is unquestioned. At the time when the treaty of 1855 was negotiated the Government had undoubtedly the power to insert in that treaty the provisions therein contained.

So it is not at all a question of power, but it is a question whether that provision in the treaty of 1855 is still in force or whether any subsequent act of Congress has modified or repealed it. Such questions are decided neither by the U. S. v. 43 Gallons of Whiskey nor by Dick vs. U. S. In each of those cases the treaty under consideration was made after the State had been admitted to the Union.

These questions can only be answered by reference to the proceedings which took place when the State of Minnesota was admitted to the Union, and by reference to the authorities.

46 The enabling act was passed on the 26th of February, 1857, 11 St. at L. 166. It provided in section 5 as follows:

"Provided, the foregoing propositions herein offered are on the condition, that the said convention which shall form the constitution of said State shall provide, by a clause in said constitution, or an ordinance, irrevocable without the consent of the United States, that said State shall never interfere with the primary disposal of the soil within the same, by the United States, or with any regulations Congress may find necessary for securing the title in said soil to bona fide purchasers thereof; and that no tax shall be imposed on lands belonging to the United States, and that in no case shall nonresident proprietors be taxed higher than residents."

These were the only agreements which Congress imposed as a condition for the entrance of Minnesota into the Union. There is nothing whatever said in the enabling act with reference to Indians. There is nothing said in it with reference to this treaty of 1855 or with reference to any other treaty. Nothing was inserted therein requiring the State in its constitution to recognize the treaty of 1855 or any other treaty, or as to the rights of the Indians to any lands within the boundaries of the State. When the constitution was adopted it contained no such recognition and Indians are mentioned

in only two places therein. By article 7, section 1, they are given the right to vote under certain circumstances. By article 15, section 2, it is provided as follows:

"*Residents on Indian lands.*—Persons residing on Indian lands within the State shall enjoy all the rights and privileges of citizens, as though they lived in any other portion of the State, and shall be subject to taxation."

It will be noticed that that section uses the word "persons"; it does not say white persons or Indians; and just what effect
47 should be given to it I shall not take time to consider. It is sufficient to say that it certainly in no way limits the rights of the State.

The act admitting the State of Minnesota into the Union was passed May 11th, 1858. That act provided in its first section:

"That the State of Minnesota shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever."

Section 3 provided in part:

"That from and after the admission of the State of Minnesota, as hereinbefore provided, all the laws of the United States which are not locally inapplicable shall have the same force and effect within that State as in other States of the Union."

The act contained nothing which in any way limited the powers of the State.

As I said before, the question is, what effect, if any, did the act admitting the State into the Union have upon the treaty of 1855; did it repeal it, or did it modify it? When I say repeal, I do not mean did it repeal all of the treaty; but did it repeal that part of article 7 which prohibited the introduction of liquor into ceded lands? I do not understand that it is claimed that the act had the effect of repealing that part of article 7 which related to the lands reserved and set apart by that treaty for the Indians. I do not understand that it is claimed that the provisions of the treaty were not in full force with regard to what was Indian country after the treaty; and no such claim can be successfully maintained, because the United States had the same jurisdiction over the reservations set apart
48 in that treaty as it had over reservations in any other State of the Union. Whether that jurisdiction is based upon the commerce clause in the Constitution, whether it is based upon the peculiar relations of the United States to the Indians, or whether it is based upon that provision of the Constitution which gives to the United States the power to make all needful rules and regulations respecting the Territories and other property of the United States, it is not necessary to determine. That such power exists is unquestioned.

U. S. v. Kagama, 118 U. S., 375.

The question in the case is whether the act admitting Minnesota into the Union repealed that part of article 7 of the treaty of 1855

which prohibited the introduction of ardent spirits into the ceded lands. That question must be determined by the authorities.

Upon the power of Congress with reference to existing treaties the Cherokee Tobacco case, 11 Wall., 616, is important.

The court said, on page 617:

"The proceeding was instituted by the defendants in error to procure the condemnation and forfeiture of the tobacco in question, and of the other property described in the libel of information, for alleged violations, which are fully set forth, of the revenue laws of the United States."

The court said, at page 618:

"The only question argued in this court, and upon which our decision must depend, is the effect to be given respectively to the 107th section of the act of 1868, and the 10th article of the treaty of 1866, between the United States and the Cherokee Nation of Indians.

"They are as follows:

"'Section 107. That the internal-revenue laws imposing taxes
49 on distilled spirits, fermented liquors, tobacco, snuff, and cigars, shall be construed to extend to such articles produced anywhere within the exterior boundaries of the United States, whether the same shall be within a collection district or not.'

"'Article 10th. Every Cherokee Indian and freed person residing in the Cherokee Nation shall have the right to sell any products of his farm, including his or her live stock, or any merchandise or manufactured products, and to ship and drive the same to market without restaint, paying any tax thereon which is now or may be levied by the United States on the quantity sold outside of the Indian Territory.'

"On behalf of the claimants it is contended that the 107th section was not intended to apply and does not apply to the country of the Cherokees, and that the immunities secured by the treaty are in full force there. The United States insist that the section applies with the same effect to the Territory in question as to any State or other Territory of the United States, and that to the extent of the provisions of the section the treaty is annulled."

And further at page 620:

"But conceding these views to be correct, it is insisted that the section can not apply to the Cherokee Nation, because it is in conflict with the treaty. Undoubtedly one or the other must yield. The repugna'cy is clear and they can not stand together.

"The second section of the fourth article of the Constitution of the United States declares that 'this Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties which shall be made under the authority of the United States, shall be the supreme law of the land.'

"It need hardly be said that a treaty can not change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our Government. The effect of treaties and acts of Congress, when in conflict, is

not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty. In the cases referred to these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, can not be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from
50 legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the Government. They are beyond the sphere of judicial cognizance. In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered. If a wrong has been done the power of redress is with Congress, not with the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief."

Going back to the case of the United States v. 43 Gallons of Whiskey, it was there declared to be the law, and is now the law, that Congress can prevent the introduction of intoxicating liquor onto lands adjacent to either one of these reservations. If it is held by the courts that the act admitting Minnesota into the Union repealed this provision of the treaty of 1855, it is within the power of Congress to re-enact it. If it is believed by Congress that that provision has always been in force and is still in force, it will be very easy for it to correct any judicial decision to the contrary.

In the case of U. S. v. McBratney, 104 U. S., 621, the question certified to the Supreme Court of the United States was "whether the Circuit Court of the United States sitting in and for the district of Colorado has jurisdiction of the crime of murder, committed by a white man upon a white man, within the Ute Reservation in said district, and within the geographical limits of the State of Colorado."

The court said, at page 623:

"By the first section of the act of Congress of Feb. 28, 1861, c. 59, to provide a temporary government for the Territory of Colorado, all territory which, by treaty with any Indian tribe, was not, without its consent, to be included within the territorial limits or
51 jurisdiction of any State or Territory, was excepted out of the boundaries and constituted no part of the Territory of Colorado; and by the sixteenth section, 'the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the said Territory of Colorado as elsewhere within the United States.' 12 Stat., 172, 176. If this provision of the section had remained in force after Colorado became a State, this indictment might doubtless have been maintained in the Circuit Court of the United States. United States vs. Rogers, 4 How., 567;

Bates v. Clark, 95 U. S., 204; United States vs. Ward, 1 Woolw., 17, 21.

"But the act of Congress of March 3, 1875, c. 139, for the admission of Colorado into the Union, authorized the inhabitants of the Territory 'to form for themselves out of said Territory a State Government, with the name of the State of Colorado; which State, when formed, shall be admitted into the Union upon an equal footing with the original States in all respects whatsoever;' and the act contains no exception of the Ute Reservation, or of jurisdiction over it. 18 Stat., pt. 3, p. 474. The provision of section one of the subsequent act of June 26, 1876, c. 147 (19 Stat., 61), that upon the admission of the State of Colorado into the Union 'the laws of the United States, not locally inapplicable, shall have the same force and effect within the State as elsewhere within the United States,' does not create any such exception. Such a provision has a less extensive effect within the limits of one of the States of the Union than in one of the Territories of which the United States have sole and exclusive jurisdiction.

"The act of March 3, 1875, necessarily repeals the provisions of any prior statute, or of any existing treaty, which are clearly inconsistent therewith. The Cherokee Tobacco, 11 Wall., 616. Whenever, upon the admission of a State into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words. The Kansas Indians, 5 Wall., 737; United States v. Ward, supra. The State of Colorado, by its admission into the Union by Congress, upon an equal footing with the original States in all respects whatever, without any such exception as had been made in the treaty with the Ute Indians and in the act establishing Territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States."

52 So in the case of Minnesota, the United States Government, when it was admitted into the Union did not see fit to make any exception or reservation with regard to lands occupied by Indians or lands which the Indians had previously ceded.

In the case of Draper v. U. S., 164 U. S., 240, the court said, at page 242:

"The Territory of Montana was organized by the act of May 26, 1864, c. 95, 13 Stat., 85. Subsequently, in 1868, the Crow Indian Reservation was created, 15 Stat., 649, the land of which it was composed being wholly situated within the geographical boundaries of the Territory of Montana. The treaty creating this reservation contained no stipulation restricting the power of the United States to include the land, embraced within the reservation, in any State or Territory then existing or which might thereafter be created. The law to enable Montana and other States to be admitted into the Union

was passed February 22, 1889, 25 Stat., 676, c. 180. This act embraced the usual provisions for a convention to frame a constitution, for the adoption of an ordinance directed to contain certain specified agreements, and provided that, upon the compliance with the ordained requirements, and the proclamation of the President so announcing, the State should be admitted on an equal footing with the original States. The question then is, has the State of Montana jurisdiction over offences committed within it geographical boundaries by persons not Indians or against Indians, or did the enabling act deprive the courts of the State of such jurisdiction of all offences committed on the Crow Indian Reservation, thereby divesting the State pro tanto of equal authority and jurisdiction over its citizens, usually enjoyed by the other States of the Union?"

After a statement of the case of U. S. v. McBratney the court said, on page 243:

"United States v. McBratney is therefore decisive of the question now before us, unless the enabling act of the State of Montana contained provisions taking that State out of the general rule and depriving its courts of the jurisdiction to them belonging and resulting from the very nature of the equality conferred on the State by virtue of its admission into the Union. Such exception is sought here to be evolved from certain provisions of the enabling act
53 of Montana which were ratified by an ordinance of the convention which framed the constitution of that State."

The section relied upon provided in substance that the Indian lands within the State should remain under the absolute jurisdiction and control of the United States. Notwithstanding that provision the court held that the courts of the State had jurisdiction over the offence which was being prosecuted.

In the case of Ward v. Race Horse, 163 U. S., 504, article 4, of the treaty made on the 24th of February, 1869, with the Bannock Tribe of Indians provided as follows:

"The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts."

The case says at page 505:

"In July, 1868, an act had been passed erecting a temporary government for the Territory of Wyoming, 15 Stat., 178, c. 235, and in this act it was provided as follows:

"'That nothing in this act shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty, between the United States and such Indians.'

"Wyoming was admitted into the Union on July 10, 1890, 26 Stat., 222, c. 664. Section 1 of that act provides as follows:

"'That the State of Wyoming is hereby declared to be a State of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original States in all respects whatever; and that the constitution which the people of Wyoming have formed for themselves be, and the same is hereby, accepted, ratified, and confirmed.'

54 "The act contains no exception or reservation in favor of or for the benefit of Indians.

"The legislature of Wyoming on July 20, 1895 (Laws of Wyoming, 1895, c. 98, p. 225), passed an act regulating the killing of game within the State. In October, 1895, the district attorney of Uinta County, State of Wyoming, filed an information against the appellee (Race Horse) for having killed in that county seven elk in violation of the law of the State. He was taken into custody by the sheriff, and it was to obtain a release from imprisonment authorized by a commitment issued under these proceedings that the writ of *habeas corpus* was sued out. The following facts are unquestioned: 1st. That the elk were killed in Uinta County, Wyoming, at a point about one hundred miles from the Fort Hall Indian Reservation, which is situated in the State of Idaho; 2d, that the killing was in violation of the laws of the State of Wyoming; 3d, that the place where the killing took place was unoccupied public land of the United States, in the sense that the United States was the owner of the fee of the land; 4th, that the place where the elk were killed was in a mountainous region some distance removed from settlements, but was used by the settlers as a range for cattle, and was within election and school districts of the State of Wyoming."

The opinion of the court was delivered by Chief Justice, then Justice, White, who said, at page 510:

"The argument, now advanced, in favor of the continued existence of the right to hunt over the land mentioned in the treaty, after it had become subject to State authority, admits that the privilege would cease by the mere fact that the United States disposed of its title to any of the land, although such disposition, when made to an individual, would give him no authority over game, and yet that the privilege continued when the United States had called into being a sovereign State, a necessary incident of whose authority was the complete power to regulate the killing of game within its borders. This argument indicates at once the conflict between the right to hunt in the unoccupied lands, within the hunting districts, and the assertion of the power to continue the exercise of the privilege in question in the State of Wyoming in defiance of its laws. That 'a treaty may supersede a prior act of Congress, and an act of Congress supersede a prior treaty,' is elementary. Fong Yue Ting v. United States, 149 U. S., 698; The Cherokee Tobacco, 11 Wall., 616. In the last case it was held that a law of Congress imposing a tax on tobacco, if in conflict with a prior treaty with the Cherokees, was

55 paramount to the treaty. Of course the settled rule undoubtedly is that repeals by implication are not favored, and will

not be held to exist if there be any other reasonable construction. Cope v. Cope, 137 U. S., 682, and authorities there cited. But in ascertaining whether both statutes can be maintained it is not to be considered that any possible theory, by which both can be enforced, must be adopted, but only that repeal by implication must be held not to have taken place if there be a reasonable construction, by which both laws can coexist consistently with the intention of Congress. United States v. Sixty-seven Packages Dry Goods, 17 How., 85; District of Columbia v. Hutton, 143 U. S., 18; Frost v. Wenie, 157 U. S., 46. The act which admitted Wyoming into the Union, as we have said, expressly declared that State should have all the powers of the other States of the Union, and made no reservation whatever in favor of the Indians. These provisions alone considered would be in conflict with the treaty if it was so construed as to allow the Indians to seek out every unoccupied piece of Government land and thereon disregard and violate the State law, passed in the undoubted exercise of its municipal authority. But the language of the act admitting Wyoming into the Union, which recognized her coequal rights, was merely declaratory of the general rule.

"In Pollard v. Hagan, 3 How., 212 (1845), the controversy was as to the validity of a patent from the United States to lands situate in Alabama, which at the date of the formation of that State were part of the shore of the Mobile River between high and low water mark. It was held that the shores of navigable waters and the soil under them were not granted by the Constitution to the United States, and hence the jurisdiction exercised thereover by the Federal Government, before the formation of the new State, was held temporarily in trust for the new State, to be thereafter created, and that such State, when created by virtue of its being, possessed the same rights and jurisdiction as had the original States. And, replying to an argument based upon the assumption that the United States had acquired the whole of Alabama from Spain, the court observed that the United States would then have held it subject to the Constitution and laws of its own Government. The court declared, p. 229, that to refuse to concede to Alabama sovereignty and jurisdiction over all the territory within her limits would be to 'deny that Alabama has been admitted into the Union on an equal footing with the original States.' The same principles were applied in Louisiana v. First Municipality, 3 How., 589.

"In Withers v. Buckley, 20 How., 84 (1857), it was held
56 that a statute of Mississippi creating commissioners for a river within the State, and prescribing their powers and duties, was within the legitimate and essential powers of the State. In answer to the contention that the statute conflicted with the act of Congress, which authorized the people of Mississippi Territory to form a constitution, in that it was inconsistent with the provision in the act that 'the navigable rivers and waters leading into the same shall be common highways and forever free, as well to the inhabitants of the

State of Mississippi as to other citizens of the United States,' the court said (p. 92):

"'In considering this act of Congress of March 1, 1817, it is unnecessary to institute any examination or criticism as to its legitimate meaning, or operation, or binding authority, farther than to affirm that it could have no effect to restrict the new State in any of its necessary attributes as an independent sovereign government, not to inhibit or diminish its perfect equality with the other members of the confederacy with which it was to be associated. These conclusions follow from the very nature and objects of the confederacy, from the language of the Constitution adopted by the States, and from the rule of interpretation pronounced by this court in the case of Pollard's Lessee v. Hagan, 3 How., 223.'

"A like ruling was made in Escanaba Company v. Chicago, 107 U. S., 678 (1882), where provisions of the ordinance of 1787 were claimed to operate to deprive the State of Illinois of the power to authorize the construction of bridges over navigable rivers within the State. The court, through Mr. Justice Field, said (p. 683):

"'But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people.'

"And it was further added (p. 688):

"'Whatever the limitation upon her powers as a government whilst in a Territorial condition, whether from the ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a State of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same footing with them * * *. Equality of the Constitutional right and power is the condition of all the States of the Union, old and new.'

57 "In Cardwell v. American Bridge Company, 113 U. S., 205 (1884), Escanaba Company v. Chicago, supra, was followed, and it was held that a clause in the act admitting California into the Union, which provided that the navigable waters within the State shall be free to citizens of the United States, in no way impaired the power which the State could exercise over the subject if the clause in question had no existence. Mr. Justice Field concluded the opinion of the court as follows (p. 212):

"'The act admitting California declares that she is "admitted into the Union on an equal footing with the original States in all respects whatever." She was not, therefore, shorn by the clause as to navigable waters within her limits of any of the powers which the original States possessed over such waters within their limits.'

"A like conclusion was applied in the case of Willamette Iron Bridge Co. vs. Hatch, 125 U. S., 1, where the act admitting the State of Oregon into the Union was construed.

"Determining by the light of these principles, the question whether the provision of the treaty giving the right to hunt on unoccupied lands of the United States in the hunting districts is repealed, in so far as the lands in such districts are now embraced within the limits of the State of Wyoming, it becomes plain that the repeal results from the conflict between the treaty and the act admitting that State into the Union. The two facts, the privilege conferred and the act of admission, are irreconcilable in the sense that the two under no reasonable hypothesis can be construed as coexisting.

"The power of all the States to regulate the killing of game within their borders will not be gainsaid, yet, if the treaty applies to the unoccupied land of the United States in the State of Wyoming, that State would be bereft of such power, since every isolated piece of land belonging to the United States as a private owner, so long as it continued to be unoccupied land, would be exempt in this regard from the authority of the State. Wyoming, then, will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other States of the Union, a power resulting from the fact of statehood and incident to its plenary existence. Nor need we stop to consider the argument advanced at bar, that as the United States, under the authority delegated to it by the Constitution in relation to Indian tribes, has a right to deal with that subject, therefore it has the power to exempt from the operation of State game laws each particular piece of land, owned by it in private ownership within a State, for nothing in this case shows that this power has been exerted by Congress. The enabling act declares that the State of Wyoming is admitted on equal terms with the other States, and this declaration, which is simply an expression of the general rule, which presupposes that States, when admitted into the Union, are endowed with powers and attributes equal in scope to those enjoyed by the States already admitted, repels any presumption that in this particular case Congress intended to admit the State of Wyoming with diminished governmental authority. The silence of the act admitting Wyoming into the Union as to the reservation of rights in favor of the Indians is given increased significance by the fact that Congress in creating the Territory expressly reserved such rights. Nor would this be affected by conceding that Congress, during the existence of the Territory, had full authority in the exercise of its treaty-making power to charge the Territory, or the land therein, with such contractual burdens as were deemed best, and that when they were imposed on a Territory it would be also within the power of Congress to continue them in the State, on its admission into the Union. Here the enabling act not only contains no expression of the intention of Congress to continue the burdens in question in the State, but, on the contrary, its intention not to do so is conveyed by the express terms of the act of admission."

58

The fact that Mr. Justice Brown dissented in that case shows that the opinion of the court was announced only after full and careful deliberation.

In the case against Sutton, to which I have referred, the opinion was apparently based upon the act admitting Washington into the Union.

In that case the court said:

"If the Yakima Reservation were within the limits of a Territory there would be no question of the validity of the statute under which this indictment was found, but the contention is that the offense charged is of a police nature and that the full police power is lodged in the State, and by it alone can such offenses be punished. By the second paragraph of sec. 4 of the enabling act with respect to the State of Washington (c. 180, 25 Stat., 677), the people of that State disclaimed all right and title 'to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until
59 the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.' Construing this, in connection with other provisions of the enabling act, it was held in Draper v. United States, 164 U. S. 240, that it did not deprive the State of jurisdiction over crimes committed within a reservation by others than Indians or against Indians, following in this United States v. McBratney, 104 U. S. 621. But in terms 'jurisdiction and control' over Indian lands remain in the United States, and there being nothing in the section withdrawing any other jurisdiction than that named in Draper v. United States, undoubtedly Congress has the right to forbid the introduction of liquor and to provide punishment for any violation thereof."

Congress has understood that in order to prohibit the manufacture and sale of intoxicating liquors in ceded Indian lands, not reservations, after the Territory is admitted as a State, it is necessary that some provision relating thereto be inserted in the enabling act. This is shown by its treatment of Oklahoma. The enabling act for that Territory, 34 St. at L., 267, expressly provided on page 269:

"And said convention shall provide in said constitution * * *. Second. That the manufacture, sale, barter, giving away, or otherwise, furnishing, except as hereinafter provided, of intoxicating liquors within those parts of said State now known as the Indian Territory and the Osage Indian Reservation, and within any other parts of said State which existed as Indian reservations on the 1st day of January, nineteen hundred and six, is prohibited for a period of twenty-one years from the date of the admission of said State into the Union, and thereafter until the people of said State shall otherwise provide by amendment of said constitution and proper State legislation."

Other provisions were required to be inserted relating to the establishment of public agencies where alcohol for the industrial arts might be sold, and where intoxicating liquors might be sold to druggists.

60 This act came before the Circuit Court of the United States for the Western District of Arkansas, in the case of United States ex rel Friedman v. United States Express Company, 180 Fed., 1006, decided last July. This was a mandamus brought by Friedman against the express company to compel it to receive and ship intoxicating liquors to its customers in that part of Oklahoma formerly the Indian Territory.

The court held that the act admitting Oklahoma into the Union had repealed the act of 1897 relating to the introduction of liquors into the Indian country, so far as the Indian Territory was concerned, and granted the mandamus.

In view of these decisions, and particularly Ward v. Race Horse, what becomes of this provision of the treaty of 1855?

I can see no difference whatsoever in principle between this case and that case. There is, to be sure, this difference: That in the Race Horse case the act prohibiting was a State act, and the act permitting was a Federal act; while here the act prohibiting is a Federal act, and the act permitting is a State act. When I say "permitting," I mean that under the laws of Minnesota intoxicating liquors can be sold under certain circumstances in this district. Notwithstanding this difference in form, I see no difference in principle between the two cases. The question is, where is the power to regulate? Does the United States Government have the power to regulate the sale of intoxicating liquors in this district or does the State of Minnesota have that power? It was said in the matter of Heff, 197 U. S.,

61 488, that there could be no divided authority. If the United States Government has the power to regulate it, that power must come in conflict with the power of the State to regulate it. Moreover, a condition of things might arise where the two cases would be identical. The act of 1897 provides, as other acts have provided, that intoxicating liquors might be introduced into the Indian country by the consent of the War Department. The laws of Minnesota provide that a town may vote that no license shall be granted and no liquor shall be sold therein. If the War Department should undertake to give permission to some person to establish a dispensary within the limits of a town which had voted not to have any license there would be immediately a conflict between the two jurisdictions, and the identical case would be presented which was presented in the Race Horse case. That case is conclusive upon this question, to my mind, and holds that this provision of the treaty of 1855, so far as it relates to ceded territory, has been repealed.

It is said that the case of the United States v. 43 Gallons of Whiskey is a holding to the contrary, and that the case of Dick v. The United States is another holding to the contrary; but in both of

these cases the treaties were made after the State had been admitted to the Union and no question of this kind was either discussed or decided.

It may be said that the repeal was unintentional. It may be said that there was not any actual intention on the part of Congress to discontinue this clause with reference to ceded territory. In support of this claim it may be argued that a similar clause was after-
62 wards inserted in the treaty of 1863. But that was not the act of Congress; it was the act only of the President and the Senate. Moreover, the extent of territory covered by that treaty was very much smaller than that covered by the treaty in question.

Before one says that this repeal was unintentional, it would be well for him to consider some of the facts alleged in the bill and admitted by the demurrer.

The tract of land ceded by this treaty commences about 30 miles west from the eastern boundary of the State, and extends westward more than 180 miles to the Dakota line. It commences near the city of Brainerd, which is about the geographical center of the State, and extends northerly more than 150 miles to the Canadian line. It covers an area of more than 15,000 square miles, and geographically is larger than the three New England States of Massachusetts, Rhode Island, and Connecticut. It has a population of 382,191, or more than the entire population of the State of Montana. The property in the district was assessed for taxation last year at $93,910,142. There is within this district Bemidji, the county seat of Beltrami County; Brainerd, the county seat of Crow Wing County; Walker, the county seat of Cass County; Bagley, the county seat of Clearwater County; Grand Rapids, the county seat of Itasca County; Park Rapids, the county seat of Hubbard County; and Detroit, the county seat of Becker County.

This is not all. Before the question as to whether the repeal was intentional or not is decided, there must be considerd the Sioux
63 treaty of 1851, 10 St. at L., 949. This contained a similar provision, and the land covered by it commences at the southeast boundary of the State and includes all the land in the State on the west side of the Mississippi River from there to Moorhead. There is more still. The Chippewa treaty of 1854, 10 St. at L., 1009, contained a clause prohibiting the sale of into*d*icating liquors in the lands thereby ceded. The tract covered by the treaty includes the present city of Duluth, with a population of 75,000 and a large tract of country in that part of the State. It is safe to say that at the time Minnesota was admitted into the Union, three-fourths of its entire area was in the same condition, so far as the sale of intoxicating liquors is concerned, as the lands in question in this case.

While the present condition of the country perhaps was not then forseen, Congress must have had in mind that the State would increase rapidly in wealth and population.

Was it the intent of Congress to keep in force a prohibition through such a vast extent of territory as this? Was it the intent of Congress to keep in force such a prohibition, and pay the enormous expense that would be necessary to make it effective?

There is a significant provision in this Sioux treaty of 1851. That treaty ceded to the United States all the lands owned by the Sioux Indians in the State of Iowa, and all the lands in the then Territory of Minnesota east of a line therein described, which is now practically the western boundary of the State. It declared that the provisions of the general law relating to the introduction of in-
64 toxicating liquors into the Indian country should continue to be in force in all of the lands ceded which lay within the Territory of Minnesota. It said nothing at all about the lands ceded which lay in the State of Iowa. That omission, to my mind, is extremely significant. It can mean but one thing, and that is that it was in the mind of Congress that it had no power to prohibit the introduction of intoxicating liquors into the State of Iowa. If that were not the reason, why was there not the same provision with regard to Iowa that there was with regard to Minnesota?

In view of these facts, who can say with any degree of certainty that this repeal was not intentional? It would have been the most simple thing in the world for Congress to have inserted some provision in the enabling act preserving this treaty stipulation with reference to the rights of the Indians, and requiring its insertion in the Minnesota constitution, as they required Oklahoma to insert a similar provision in its constitution. But nothing of that kind was done.

There is another matter that has been referred to, and that is the practical construction that has been put upon this treaty by the Government. The bill alleges that the United States never attempted to enforce the treaty in the ceded lands until last year. The treaty having been promulgated in 1855, there passed more than fifty years of absolute quiescence on the part of the Government. It can therefore well be said that it never was supposed that this treaty stipulation survived the admission of Minnesota into the Union.
65 But it is entirely beside the mark to guess and speculate as to what Congress would have done if its attention had been particularly called to the precise question here under discussion. This case must be decided, not upon an intention which was not expressed, but upon one that was expressed.

Referring again to the case of Ward vs. Race Horse, the court there said:

"The act which admitted Wyoming into the Union, as we have said, expressly declared that that State should have all the powers of the other States of the Union, and made no reservation whatever in favor of the Indians. These provisions alone considered would be in conflict with the treaty if it were so construed as to allow the Indians to seek out every unoccupied piece of Government land and thereon disregard and violate the State law, passed in the undoubted exercise of its municipal authority."

The opinion of the Attorney General (25 Op. Atty. Gen., 416), to my mind, does not cover this case, because it refers to reservations and not to ceded lands. While it is true that there are certain statements in the opinion to the effect that the provision as to ceded lands is still in force, yet no authorities are cited in support of that statement.

I can come to only one conclusion in the case, and that is that the provision in article 7 of the treaty of 1855, which prohibited the introduction of intoxicating liquors into the ceded country, was repealed by the act admitting Minnesota into the Union. It is therefore not necessary to consider any of the other questions argued by counsel.

I express no opinion upon the question as to whether the subsequent treaty of 1865 re-ceding to the Indians the land where Be-
66 midji now stands, and the treaty of 1867 by which the Indians again ceded to the United States that land, with no clause of this kind in the treaty, repealed article 7 of the treaty of 1855.

One of the grounds of demurrer to the bill states that the court has no jurisdiction of the case. Its jurisdiction rests upon diverse citizenship. It may be said to rest also upon the fact that the case arises under the laws of the United States. Yet if it did, that would not defeat the jurisdiction, even under the ruling in Macon Grocery Co. v. Atlantic Coast Line, 215 U. S. 501.

The objection that the defendants were sued in the wrong district was waived by their general appearance.

The result is that I will make an order overruling the demurrer to the bill, and assigning the defendants to answer at the next rule day. I will also make an order granting a temporary injunction, as prayed for in the bill.

(Indorsed:) Filed Jan. 13, 1911.

67 And on January 10th, 191', the following order for a writ of temporary injunction was filed and entered of record in said cause, to wit:

68 In the Circuit Court of the United States for the District of Minnesota, Fourth Division.

EDWIN GEARLDS, L. J. KRAMER, FRED E. Brinkman, E. E. Gearlds, Albert Marshik, John A. Dalton, Edwin S. Fay, F. S. Lycan, John H. Sullivan, Harry Gunsalus, J. E. Maloy, and Tillie Larson, complainants, *v.* W. E. JOHNSON, T. E. BRENTS, AND H. F. Coggeshall, defendants.	Order for temporary writ of injunction.

The above entitled matter and proceeding having come before the court on the 9th day of January, 1911, the said time having been fixed

by and with the agreement and consent of the attorneys for the hearing of the application on the part of the complainants for a temporary injunction and for a hearing upon the demurrer of the defendants to the amended bill in said cause, the complainants being represented by Messrs. Marshall A. Spooner and E. E. McDonald, and Charles C. Houpt, Esq., United States district attorney for the District of Minnesota, appearing in behalf of the defendants; and the court having heard the arguments of counsel upon the said motion and application for a temporary injunction, and upon the demurrer so filed to the amended bill herein, which were heard and considered together, and the court now being duly advised in the premises; and it being made to appear to the court that the complainants are entitled to a temporary injunction herein;

It is therefore ordered: That a temporary writ of injunction issue out of and under the seal of this court in the usual form, enjoining and restraining the defendants and each of them during the pendency of this action, or until the further order of the court, and each of their agents, servants, employes, and deputies, and all persons claiming to act by, through, and under them, from going upon the
69 respective premises of the said several complainants particularly described in the amended bill filed in said cause, and from molesting or interfering with the said complainants or either of them in the conduct of their and each of their business and businesses as saloon keepers or in conducting bars and in selling and disposing of vinous, spirituous, malt, and other intoxicating liquors, while engaged in said business, and in conducting the same with persons other than Indians, and under the pretense and claim that it is unlawful to sell and dispose of such liquors, or either or any of the same, in the territory embraced within the limits of the said city of Bemidji, and from taking into their possession, or molesting or interfering with, seizing or destroying any of the stock, or the stocks on hand or in the possession of either or any of the said complainants, or any of the personal property of said complainants used in connection with such business either as now situated upon the said premises described in the bill herein, or which complainants or either of them may hereafter acquire, place, or keep within any building on either of said premises, or any other building to which either of the said complainants may remove the same or any part thereof.

And it is further ordered that the said demurrer of the said defendants to the said amended bill be, and the same is hereby, overruled, but with leave to the said defendants to answer the said amended bill on or before the next rule day, if they be so advised.

Dated this 9th day of January, 1911.

CHARLES A. WILLARD, *Judge.*

(Endorsed:) Filed Jan. 10, 1911. Henry D. Lang, clerk, by Clara M. Owens, deputy.

70 And on March 28th, 1911, the following amended bill of complaint was filed of record in said cause, to wit:

71 In the Circuit Court of the United States for the District of Minnesota, Fourth Division.

EDWIN GEARLDS, L. J. KRAMER, FRED E. BRINKMAN, E. E. Gearlds, Albert Marshik, John A. Dalton, Edwin Fay, F. S. Lycan, John H. Sullivan, Harry Gunsalus, J. E. Maloy, and Tillie Larson, complainants, *vs.* W. E. JOHNSON, T. E. BRENTS, and H. F. COGGESHALL, defendants.	In equity.

To the honorable the judges of the Circuit Court of the United States for the District of Minnesota:

Edwin Gearlds, L. J. Kramer, Fred E. Brinkman, E. E. Gearlds, Albert Marshik, John A. Dalton, Edwin Fay, F. S. Lycan, John H. Sullivan, Harry Gunsalus, J. E. Maloy, and Tillie Larson, each a resident of the city of Bemidji, Beltrami County, in the State of Minnesota, and each a citizen of the State of Minnesota, bring this bill against W. E. Johnson, a citizen of the State of California, T. E. Brents, a citizen of the State of Oklahoma, and H. F. Coggeshall, a citizen of the State of New York, and thereupon your orators complain and say:

That your complainant, Edwin Gearlds, is a resident and citizen of the city of Bemidji, Beltrami County, Minnesota, and for more than two years continuously last past has been engaged at the
72 said city of Bemidji, in the business of saloon keeper, and in the selling and disposing at retail of spirituous and vinous liquors, beer, ale, and porter, at a known and established place of business, to wit, in a store building on lot eight (8) in block fourteen (14) in said city of Bemidji, and was and is authorized to conduct such business by both Federal and municipal authority, in that the said complainant duly paid to the Internal Revenue Department of the United States Government the sum of twenty-five ($25) dollars as a special tax on the business of retail liquor dealer at the place hereinbefore specifically mentioned, and for the purpose of enabling the said complainant to so engage in such business at such place, and received from said Government a receipt for such special tax on the business of retail liquor dealer at and in such location, and the said receipt so issued to said complainant was issued to cover a period to include the period between and including July 1st, 1910, and June 21st, 1911, and said complainant was authorized, by reason of such payment and the issuance of the said receipt therefor, to engage in the business of retailing said intoxicating liquors at such places during such period in quantities less than five (5) gallons at a

time; that the said Edwin Gearlds also held at all such times, and now holds, a license issued on the authority of the State of Minnesota, and by the municipal council, and the officials of the said city of Bemidji authorizing and permitting the said Edwin Gearlds to conduct such saloon business, and to sell and dispose of said intoxicating liquors at retail, which said license was in full force at all the times hereinafter referred to.

That the complainant, L. J. Kramer, is a resident and citizen of the city of Bemidji, Beltrami County, Minnesota, and for more than two years continuously last past has been engaged, at the said city of Bemidji, in the business of saloon keeper and in the selling and disposing at retail of spirituous and vinous liquors, beer, ale, and
73 porter, at a known and established place of business, to wit, in a store building on lot fourteen in block fourteen (14) in said city of Bemidji, and was and is authorized to conduct such business by both Federal and municipal authority, in that the said complainant duly paid to the Internal Revenue Department of the United States Government the sum of twenty-five ($25) dollars as a special tax on the business of retail liquor dealer at the place hereinbefore specifically mentioned, and for the purpose of enabling the said complainant to so engage in such business at such place, and received from said Government a receipt for such special tax on the business of retail liquor dealer at and in such location, and the said receipt so issued to said complainant was issued to cover a period to include the period between and including July 1st, 1910, and June 21st, 1911, and said complainant was authorized, by reason of such payment and the issuance of the said receipt therefor, to engage in the business of retailing intoxicating liquors at such places during such period in quantities less than five (5) gallons at a time; that the said L. J. Kramer also held at all such times, and now holds, a license issued on the authority of the State of Minnesota, and by the municipal council and the officials of the said city of Bemidji, authorizing and permitting the said L. J. Kramer to conduct a saloon business and to sell and dispose of intoxicating liquors at retail, which said license was in full force at all the times hereinafter referred to.

That the complainant, Fred E. Brinkman, is a resident and citizen of the city of Bemidji, Beltrami County, Minnesota, and for fourteen years continuously last past has been engaged, at the said city of Bemidji, in the business of saloon keeper and in the selling and disposing at retail of spirituous and vinous liquors, beer, ale, and porter, at a known and established place of business, to wit, in a store building on lot ten (10) in block seventeen (17) in said city of Bemidji, and was and is authorized to conduct such business
74 by both Federal and municipal authority, in that the said complainant duly paid to the Internal-Revenue Department of the United States Government the sum of twenty-five ($25) dollars as a special tax on the business of retail liquor dealer at the place hereinbefore specifically mentioned, and for the purpose of enabling the said complainant to so engage in such business at such place, and

received from said Government a receipt for such special tax on the business of retail liquor dealer at and in such location, and the said receipt so issued to said complainant was issued to cover a period to include the period between and including July 1st, 1910, and June 21st, 1911, and said complainant was authorized, by reason of such payment and the issuance of the said receipt therefor, to engage in the business of retailing intoxicating liquors at such place and during such period in quantities less than five (5) gallons at a time; that the said Fred E. Brinkman also held at all such times, and now holds, a license issued on the authority of the State of Minnesota, and by the municipal council and the officials of the said city of Bemidji, authorizing and permitting the said Fred E. Brinkman to conduct such saloon business and to sell and dispose of intoxicating liquors at retail, which said license was in full force at all the times hereinafter referred to.

That the complainant, E. E. Gearlds, is a resident and citizen of the city of Bemidji, Beltrami County, Minnesota, and for more than three years continuously last past has been engaged, at the said city of Bemidji, in the business of saloon keeper, and in the selling and disposing at retail of spirituous and vinous liquors, beer, ale, and porter, at a known and established place of business, to wit: In a store building on lot eleven (11) in block fourteen (14) in said city of Bemidji, and was and is authorized to conduct such business by both Federal and municipal authority, in that the said complainant duly paid to the Internal Revenue Department of the United States
Government the sum of twenty-five ($25) dollars as a special
75 tax on the business of retail liquor dealer at the place hereinbefore specifically mentioned, and for the purpose of enabling the said complainant to so engage in such business at such place, and received from said Government a receipt for such special tax on the business of retail liquor dealer at and in such location, and the said receipt so issued to said complainant was issued to cover a period between and including July 1st, 1910, and June 21st, 1911, and said complainant was authorized, by reason of such payment and the issuance of the said receipt thereof, to engage in the business of retailing intoxicating liquors at such place during such period in quantities less than five (5) gallons at a time; that the said E. E. Gearlds also held at all such times, and now holds, a license issued on the authority of the State of Minnesota, and by the municipal council, and the officials of the said city of Bemidji, authorizing and permitting the said E. E. Gearlds to conduct such saloon business, and to sell and dispose of intoxicating liquors at retail, which said license was in full force at all the times hereinafter referred to.

That the said complainant, Albert Marshik, is a resident and citizen of the city of Bemidji, Beltrami County, Minnesota, and for more than one year continuously last past has been engaged, at the said city of Bemidji, in the business of saloon keeper, and in the selling and disposing at retail of spirituous and vinous liquors, beer,

ale, and porter at a known and established place of business, to wit: In a store building on lot six (6) in block seventeen (17) in said city of Bemidji, and was and is authorized to conduct such business by both Federal and municipal authority, in that the said complainant duly paid to the Internal Revenue Department of the United States Government the sum of twenty-five ($25) dollars as a special tax on the business of retail liquor dealer at the place hereinbefore specifically mentioned, and for the purpose of enabling the
76 said complainant to so engage in such business at such place, and received from said Government a receipt for such special tax on the business of retail liquor dealer at and in such location, and the said receipt so issued to said complainant was issued to cover a period to include the period between and including July 1st, 1910, and June 21st, 1911, and said complainant was authorized, by reason of such payment and the issuance of the said receipt therefor, to engage in the business of retailing intoxicating liquors at such place during such period in quantities less than five (5) gallons at a time; that the said Albert Marshik also held at all such times, and now holds, a license issued on the authority of the State of Minnesota and by the municipal council, and the officials of the said city of Bemidji, authorizing and permitting the said Albert Marshik to conduct a saloon business, and to sell and dispose of intoxicating liquors at retail, which said license was in full force at all the times hereinafter referred to.

That the complainant, John A. Dalton, is a resident and citizen of the city of Bemidji, Beltrami County, Minnesota, and for more than three years continuously last past has been engaged, at the said city of Bemidji, in the business of saloon keeper, and in the selling and disposing at retail of spirituous and vinous liquors, beer, ale, and porter at a known and established place of business, to wit: In a store building on lot one (1), block seventeen (17) in said city of Bemidji, and was and is authorized to conduct such business by both Federal and municipal authority, in that the said complainant duly paid to the Internal Revenue Department of the United States Government, the sum of twenty-five ($25) dollars as a special tax on the business of retail liquor dealer at the place hereinbefore specifically mentioned, and for the purpose of enabling the said complainant to so engage in such business, and received from said Government a receipt for such special tax on the business of retail
77 liquor dealer at and in such location, and the said receipt so issued to said complainant was issued to cover a period to include the period between and including July 1st, 1910, and June 21st, 1911, and said complainant was authorized, by reason of such payment and the issuance of the said receipt therefor, to engage in the business of retailing intoxicating liquors at such place and during such period in quantities less than five (5) gallons at a time; that the said John A. Dalton also held at all such times, and now holds, a license issued on the authority of the State of Minnesota,

and by the municipal council, and the officials of the said city of Bemidji, authorizing and permitting the said John A. Dalton to conduct a saloon business, and to sell and dispose of intoxicating liquors at retail, which said license was in full force at all the times hereinafter referred to.

That the complainant, Edwin Fay, is a resident and citizen of the city of Bemidji, Beltrami County, Minnesota, and for more than one year continuously last past has been engaged, at said city of Bemidji, in the business of saloon keeper, and in the selling and disposing at retail of spirituous and vinous liquors, beer, ale, and porter, at a well-known and established place of business, to wit: In a store building on lot eight (8) in block nineteen (19) in said city of Bemidji, and was and is authorized to conduct such business by both Federal and municipal authority, in that the said complainant duly paid to the Internal Revenue Department of the United States Government the sum of twenty-five ($25) dollars as a special tax on the business of retail liquor dealer at the place hereinbefore specifically mentioned, and for the purpose of enabling the said complainant to so engage in such business at such place, and received from said Government a receipt for said special tax on the business of retail liquor dealer at and in such location, and the said receipt so issued to said complainant was issued to cover a period to include the period between and including July 1st, 1910, and June 21st, 1911, and said complainant was authorized, by reason of such
78 payment and the issuance of the said receipt therefor, to engage in the business of retailing intoxicating liquors at such place during such period in quantities less than five (5) gallons at a time; that the said Edwin Fay also held at all such times, and now holds, a license issued on the authority of the State of Minnesota, and by the municipal council, and the officials of the said city of Bemidji, authorizing and permitting the said Edwin Fay to conduct such saloon business, and to sell and dispose of intoxicating liquors at retail, which said license was in full force at all the times hereinafter referred to.

That the said complainant, F. S. Lycan, is a resident and citizen of the city of Bemidji, Beltrami County, Minnesota, and for more than four years last past has been engaged, at said city of Bemidji, in the business of operating and conducting a bar, in connection with and incidental to a hotel business conducted by said complainant in the Markham Hotel building situated on lots thirteen (13) and fourteen (14) in block eighteen (18) in the original townsite of Bemidji, Minnesota, at which bar said complainant has been engaged in the selling and disposing at retail of spirituous and vinous liquors, beer, ale, and porter, and was and is authorized to conduct such business by both Federal and municipal authorities, in that the said complainant duly paid to the Internal Revenue Department of the United

States Government, the sum of twenty-five ($25) dollars as a special tax on the business of retail liquor dealer at the place hereinbefore specifically mentioned, and for the purpose of enabling the said complainant to so engage in such business at such place, and received from said Government a receipt for such special tax on the business of retail liquor dealer at and in such location, and the said receipt so issued to said complainant was issued to cover a period to include the period between and including July 1st, 1910, and June 21st, 1911, and the said complainant was authorized, by reason of such
79 payment and the issuance of the said receipt therefor, to engage in the business of retailing intoxicating liquors at such place during such period in quantities less than five (5) gallons at a time; that the said F. S. Lycan also held at all such times, and now holds, a license issued on the authority of the State of Minnesota and by the municipal council and the officials of the said city of Bemidji authorizing and permitting the said F. S. Lycan to conduct such bar and to sell and dispose of intoxicating liquors at retail, which said license was in full force at all the times hereinafter referred to.

That the said complainant, John H. Sullivan, is a resident and citizen of the city of Bemidji, Beltrami County, Minnesota, and for more than five years continuously last past has been engaged, at said city of Bemidji, in the business of saloon keeper, and in the selling and disposing at retail of spirituous and vinous liquors, beer, ale, and porter at a known and established place of business, to wit, in a store building on lot one (1) in block twenty-one in said city of Bemidji, and was and is authorized to conduct such business by both Federal and municipal authority, in that the said complainant duly paid to the Internal Revenue Department of the United States Government the sum of twenty-five ($25) dollars as a special tax on the business of retail liquor dealer at the place hereinbefore specifically mentioned, and for the purpose of enabling the said complainant to so engage in such business at such place, and received from said Government a receipt for such special tax on the business of retail liquor dealer at and in such location, and the said receipt so issued to said complainant was issued to cover a period to include the period between and including July 1st, 1910, and June 21st, 1911, and said complainant was authorized, by reason of such payment and the issuance of the said receipt therefor, to engage in the business of retailing intoxicating liquors at such place during such period in quan-
80 tities less than five (5) gallons at a time; that the said John H. Sullivan also held at all such times, and now holds, a license issued on the authority of the State of Minnesota and by the municipal council and the officials of the said city of Bemidji authorizing and permitting the said John H. Sullivan to conduct such saloon business and to sell and dispose of intoxicating liquors at retail, which said license was in full force at all the times hereinafter referred to.

That the complainant, Harry Gunsalus, is a resident and citizen of the city of Bemidji, Beltrami County, Minnesota, and for more than

one year continuously last past has been engaged, at said city of Bemidji, in the business of saloon keeper and the selling and disposing at retail of spirituous and vinous liquors, beer, ale, and porter, at a known and established place of business, to wit, in a store building on lots eleven (11) and twelve (12) in block (17) in said city of Bemidji, and was and is authorized to conduct such business by both Federal and municipal authority, in that the said complainant duly paid to the Internal Revenue Department of the United States Government the sum of twenty-five ($25) dollars as a special tax on the business of retail liquor dealer at the place hereinbefore specifically mentioned, and for the purpose of enabling the said complainant to so engage in such business at such place, and received from said Government a receipt for such special tax on the business of retail liquor dealer at and in such location, and the said receipt so issued to said complainant was issued to cover a period including the period between and including July 1st, 1910, and June 21st, 1911, and said complainant was authorized, by reason of such payment and the issuance of the said receipt therefor, to engage in the business of retailing intoxicating liquors at such place during such period in quantities less than five (5) gallons at a time; that the said Harry Gunsalus also held at all such times, and now holds, a license issued on the authority of
81 the State of Minnesota, and by the municipal council and the officials of the said city of Bemidji, authorizing and permitting the said Harry Gunsalus to conduct a saloon business and to sell and dispose of intoxicating liquors at retail, which said license was in full force at all the times hereinafter referred to.

That the complainant, J. E. Maloy, is a resident and citizen of the city of Bemidji, Beltrami County, Minnesota, and for more than three years continuously last past has been engaged, at the said city of Bemidji, in the business of saloon keeper and in the selling and disposing at retail of spirituous and vinous liquors, beer, ale, and porter, at a known and established place of business, to wit, in a store building on lot five (5) in block seventeen (17) in said city of Bemidji, and was and is authorized to conduct such business by both Federal and municipal authority, in that the said complainant duly paid to the Internal Revenue Department of the United States Government the sum of twenty-five ($25) dollars as a special tax on the business of retail liquor dealer at the place hereinbefore specifically mentioned, and for the purpose of enabling the said complainant to so engage in such business at such place, and received from said Government a receipt for such special tax on the business of retail liquor dealer at and in such location, and the said receipt so issued to said complainant was issued to cover a period between and including July 1st, 1910, and June 21st, 1911, and the said complainant was authorized by reason of such payment and the issuance of the said receipt therefor to engage in the business of retailing intoxicating liquors at such place during such period in quantities less than five (5) gallons at a

time; that the said J. E. Maloy also held at all such times, and now holds, a license issued on the authority of the State of Minnesota, and by the municipal council and the officials of the said city
82 of Bemidji, authorizing and permitting the said J. E. Maloy to conduct a saloon business and to sell and dispose of intoxicating liquors at retail, which said license was in full force at all the times hereinafter referred to.

That the complainant, Tillie Larson, is a resident and citizen of the city of Bemidji, Beltrami County, Minnesota, and for more than four years continuously last has been engaged, at the said city of Bemidji, in the business of saloon keeper, and in the selling and disposing at retail of spirituous and vinous liquors, beer, ale, and porter, at a known and established place of business, to wit: Lot eight (8) in block seventeen (17) in said city of Bemidji, and was and is authorized to conduct such business by both Federal and municipal authority, in that the said complainant duly paid to the Internal Revenue Department of the United States Government the sum of twenty-five ($25) dollars as a special tax on the business of retail liquor dealer at the place hereinbefore specifically mentioned, and for the purpose of enabling the said complainant to so engage in such business at such place, and received from said Government a receipt for such special tax on the business of retail liquor dealer at and in such location, and the said receipt so issued to said complainant was issued to cover a period to include the period between and including July 1st, 1910, and June 21st, 1911, and said complainant was authorized, by reason of such payment and the issuance of the said receipt therefor, to engage in the business of retailing intoxicating liquors at such place during such period in quantities less than five (5) gallons at a time; that the said Tillie Larson also held at all such times, and now holds, a license issued on the authority of the State of Minnesota, and by the municipal council, and the officials of the said city of Bemidji authorizing and permitting the said Tillie Larson to conduct a saloon business, and to sell and dispose of intoxicating liquors at retail, which said license was in full force at all the times hereinafter referred to.

83 That the value of the personal property and of the business of each of said complainants herein referred to, and which will be affected by the acts of the defendants herein mentioned, exceeds the sum of two thousand dollars ($2,000) in each instance, exclusive of interest and costs, and said complainants and each of them will be damaged in an amount exceeding two thousand dollars ($2,000) *dollars* each, exclusive of interest and costs, in case the defendants, and each of them, proceed to do the acts and things herein complained of, and the matter in dispute herein as respects each of said complainants, exclusive of interest and costs, exceeds the sum of two thousand dollars ($2,000).

Your orators further say that they each, in vending and disposing of liquors under their said licenses, have refrained from selling or dis-

posing of any liquor to Indians or individuals of Indian blood, and each has, in every way and in all respects, complied with and observed all laws of the United States and of the State of Minnesota providing against the sale of liquor to Indians, or enacted to prevent liquor coming into their possession, and each of your orators has endeavored to obey, and has obeyed, and complied with all laws regulating the sale of, and traffic in, such liquors.

Your orators each further say that each of them has built up and established a profitable and lucrative trade in his respective place of business, as hereinbefore described and set forth, and that each of said complainants will be affected by the acts of the defendants if done and carried out as by them threatened, and as hereinafter more particularly set forth, and that each of said complainants has a common interest in any restraining or injunctional order herein sought, and in any such remedy as in this proceeding it is sought to have administered, and by joining in this action, and in seeking the relief herein asked these complainants seek to avoid a multiplicity of actions and suits, and your orators further say that unless the said defendants are restrained and enjoined from doing the acts hereinafter set forth, the established business of each of these complainants will be destroyed and ruined, and your orators are without any plain, adequate, or speedy remedy at law and can only have relief in a court of equity, and that irrevocable injury will be inflicted upon your orators, and each of them, in case this honorable court does not enjoin and restrain the defendants, and each of them, from doing and performing the acts and things hereinafter referred to, and which said defendants and each of them now threaten to do.

Your orators further say that Beltrami County, Minnesota,
84 is now, and ever since the year 1897, has been a municipal corporation duly organized, created, and existing under and by virtue of the laws of the State of Minnesota, and forming a part of said State and as such county has had within its territory, during all the time elapsing since its organization, the usual county, town, city, and village officers, and the various forms of local government as provided for and prescribed by the laws of the State of Minnesota applying to organized counties and lesser political subdivisions; that the city of Bemidji, herein referred to, is the county seat of said Beltrami County, and is a municipal corporation organized under the laws of the State of Minnesota as a city, and within its corporate limits contains a population of about seven thousand inhabitants, and in connection with other municipalities, to wit, villages under separate organizations, but immediately adjacent to the territorial limits of said municipality and which latter, except for the fact that they exist under a separate and distinct governmental organization, are commercially a part of said city, constitutes a community which has a population of about 9,000 people. That the original form of government of the said Bemidji was that of a village form of government under the laws of the State of Minnesota and such village was

organized under the laws of said State in the year 1898; that said city of Bemidji is, and since its original organization as a village has been, a growing and thrifty town increasing rapidly in population, and the country tributary thereto has had and enjoyed a like growth; that there are many blocks of substantial business buildings, largely brick and stone, in said city, and hundreds of beautiful and costly residences, nine churches of nine different denominations, four costly and expenses schoolhouses, a costly public library, a courthouse and other county property of the value of at least one hundred thousand dollars, ten hotels, an extensive system of water works and an electric light plant; the city is situated on five lines of railroad, three of said lines being either transcontinental or parts of transcontinental lines, and said city is now recognized as the metropolis
85 of the northern central portion of Minnesota; that within the immediate vicinity of the said city of Bemidji are many smaller, flourishing, and thrifty towns; that there are situated on the Minnesota & International Railway, which is a part of the Northern Pacific Railway system, north of said city of Bemidji and between said city and the boundary line between the United States and Canada, within a distance of 108 miles, seventeen stations and towns; that there are situated on the Great Northern Railway, between said city of Bemidji and the Red River of the North, on the line of said railway, running east and west thru said city of Bemidji, within a distance of 92 miles, fifteen thriving and important towns; that there are situated on said Great Northern Railroad, east of the said city of Bemidji and between said city of Bemidji and the city of Duluth, Minnesota, within a distance of 150 miles, twenty flourishing and thriving villages and towns; and that south of the said city of Bemidji, on said Northern Pacific line, between it and the city of Brainerd, which is, practically, the geographical center of the State of Minnesota, and within 92 miles are sixteen important and thriving towns and stations; that within a distance of 87 miles of said city of Bemidji on the Sauk Center branch of the Great Northern Railroad, there are twelve or more prominent, prosperous, thriving towns, and villages; that on the Minneapolis, St. Paul & Sault Ste. Marie Railroad, but recently built thru the said city of Bemidji, and which said line has been projected as the main and direct line of said road between the city of Winnipeg, Canada, and the city of Chicago, Illinois, and within a distance of 40 miles in either direction from said city of Bemidji, on said line, there are at least twenty thriving and growing towns and villages; that the assessed value of real and personal property for the said city of Bemidji for the purpose of taxation is now the sum of 1,615,572 dollars; that the assessed valuation of real and personal property for the purpose of taxation in said Bel-
86 trami County is now the sum of 6,881,175 dollars; that the assessed valuation of all the counties affected by such treaty of 1855, was, in the year 1909, $93,910,142. That many farms have been opened up in all directions from said city of Bemidji and the country adjacent thereto not already opened up is rapidly being taken up

and converted into farms; that all the country lying within the exterior boundaries of the territory of 1855 is now populated with white people.

And your orators further state that there are not now and heretofore have not been any Indians resident in said territory or heretofore enrolled at the Government Indian agencies who are not now, and who for several years have not been allottees, either under the act of Congress of February, 1887, or January 14th, 1899, or their children; and that each and all of such now are and for several years last past have been full citizens of the United States and entitled to all the rights, privileges, and immunities of such citizens. That no Indian, nor his descendant, having or entitled to a residence upon, or being within said territory, or heretofore a member of the Chippewa Tribe of Indians, now sustains or recognizes the existence of any tribal relationship as between himself and any other Indian, and all tribal relations, as among the Chippewa Tribe of Indians and the several bands of Indians originally constituting such tribe within said territory, have been abandoned, abolished, set aside, and are now ignored, and the several individuals and members heretofore composing said bands and said tribe within said Territory now recognize no allegiance to any chief or leader or other authority among such Indians. That there are not now any Indian reservations of any kind within said Territory, and all the lands embraced within the exterior boundaries of the Territory affected by the treaty of 1855 have been ceded to the United States or have been disposed of under the laws of the United States relating to the disposition of the public lands, or have been designated as forestry reserve, or have been allotted to the individual Indians, except such small portions of land as have been retained by the United States Government at its former Indian agencies, a part of which latter is an area of land not exceeding 160 acres on what was formerly the White Earth Reservation, and upon a portion of which stand the old agency buildings and Indian schoolhouses, and upon which is situated the town-
87 site of White Earth, lots in which townsite are now being sold by the United States Government to white people or Indians, as applications therefor are made, and an area of about 600 acres on a point of land in Leech Lake, upon which is located the old Indian agency buildings and Indian school buildings; an area of land of less than 80 acres north of Cass Lake, upon which are buildings formerly used for an Indian school; and a tract of land of less than 200 acres, on which are the buildings formerly occupied for an Indian school at Bena, Minnesota, the use of which, for such purposes, has been abandoned. That the said lands at White Earth and Leach Lake, upon which are located the buildings occupied by the superintendents of Indian schools and disbursing agents, are more than 40 miles distant from the said city of Bemidji. That since the allotments to the Indians herein referred to, the duties and authority of the Indian agents in said Territory have been materially changed and modified, and the officials formerly acting in that capacity have

now practically no duties to perform, except to superintend the affairs relating to Indian schools and to disburse annuities to the Indians.

That the laws of the State of Minnesota now prohibit, and ever since 1866 have prohibited, the sale of intoxicating liquors of any kind to persons of Indian blood, without any exception or qualification, and have made a violation of this law a felony.

That Indians very infrequently visit the city of Bemidji, and then only in small numbers and for the purpose of selling berries during the berry season, and there are no Indian habitations within a range of twenty miles in any direction from the said city of Bemidji, and the said city of Bemidji now is, and for at least twelve years last past has been, as well as the territory surrounding the same, under municipal and State government, and in all said territory the jurisdiction of the State for all purposes of government has been full and complete, and since the year 1867, as hereinbefore more fully set forth, the Indian title to the territory embraced within the city limits of the said city of Bemidji and adjoining territory has been completely extinguished.

Your orators further say that prior to the 22nd day of February, 1855, a tribe of Indians, known as Chippewa Indians, comprising the Mississippi, Pillager, and Lake Winnibegoshish Bands of Chippewa Indians, were in possession of the greater portion of the lands north of parallel 46, within the boundaries of the then Territory of Minnesota, and on said date the said bands of Indians entered into a treaty with the United States, under the terms of which there was sold and conveyed to the said United States all the right, title, and interest in and to the lands then owned and claimed by the said bands of Indians in the Territory of Minnesota north of a line near to said 46th parallel of latitude, excepting that by the second article of
88 said treaty there were set apart to the said Indians certain scattering reservations, none of which latter included any lands at any time within the municipal limits of the said city of Bemidji, nor any lands adjacent thereto or within at least ten miles thereof, and under the terms of such treaty the United States took over and became the owner and possessor of the lands now within the territorial limits of the said city of Bemidji, and all lands adjoining and contiguous thereto for many miles to the north, west, and south, and for at least ten miles to the east of where said city is now located; that among other provisions of the said treaty there was included in the said treaty the following language:

"Article 7. The laws which have been or may be enacted by Congress, regulating trade and intercourse with the Indian tribes, to continue and be in force within the several reservations provided for herein; and those portions of said laws which prohibit the introduction, manufacture, use of, and traffic in, ardent spirits, wines, or other liquors, in the Indian country, shall continue to be in force, wherein the entire boundaries of the country herein ceded to the United States, until otherwise provided by Congress."

Your orators say that they are advised and believe, and accordingly state that the defendants have done the acts hereinafter referred to, and are about to do and perform the things hereinafter complained of, claiming to derive their authority so to do, largely if not entirely, from the provisions contained in said article 7.

Your orators further state that these defendants, and especially the defendants W. E. Johnson and T. E. Brents, acting in conjunction and in unison as special officers connected with the Indian Department as administered by the Interior Department of the United States Government, and claiming to act under authority conferred by said article 7 of said treaty aforesaid, and the provisions of sections 2139 and 2140 of the United States statutes and amendments thereof, have at divers and sundry towns and
89 cities of northern Minnesota, and included within the territory ceded to the United States Government under the said treaty of February 22d, 1855, and which treaty was ratified March 3d, 1855, and proclaimed April 7th, 1855, including the city of Brainerd, the county seat of Crow Wing County, in said State; the village of Walker, the county seat of Cass County, in said State; the village of Bagley, the county seat of Clearwater County, in said State; the village of Grand Rapids, the county seat of Itasca County, in said State; the village of Park Rapids, the county seat of Hubbard County, in said State; the city of Detroit, the county seat of Becker County, in said State; and in many other towns and villages in said territory, ceded as aforesaid, and in each of which places and over the inhabitants of which, the jurisdiction of the State for all purposes of government was full and complete and generally and universally recognized so to be, entered upon private property where individuals and concerns were engaged in the sale of intoxicating liquors, and in each of which instances the persons and concerns so engaged held licenses from the United States Government to sell at retail, and also licenses from the county or municipal government to sell and dispose of such liquors under licenses authorized to be issued under the laws of the State of Minnesota, and in instances destroyed such liquors in stock, and in other instances compelled the proprietors, engaged in the business of vending such liquors, to ship the same to other and remote portions of the said State, and into territory beyond the limits of the land ceded by the said Chippewa Indians to the United States under said treaty, and then and there claimed and asserted that the city of St. Paul was the nearest point into which intoxicating liquors might be shipped, and the nearest point in the State not coming within the provisions of some similar treaty provision against the introduction into and presence of intoxicating liquor in Indian country, and ordered and directed the proprietors of such places to close up their places of business and to
desist from further engaging in such business at such places
90 and have threatened to arrest and prosecute such proprietors under the claim that they are unlawfully selling and disposing of liquor in "the Indian country," contrary to the provisions

of the said statutes and the said article 7 of said treaty, and the said defendants, and especially the said T. E. Brents and H. F. Coggeshall, acting jointly and in unison, did, on the 9th day of December, 1910, order and direct twenty other saloon keepers in the said city of Bemidji, holding licenses issued by the Federal Government to sell intoxicating liquors at retail in quantities less than five (5) gallons at a time, and holding municipal licenses, issued under the authority of the State of Minnesota, to vend intoxicating liquors, to close up their places of business and to desist further in the sale and disposition of such liquors in said city of Bemidji, and ordered and directed said saloon keepers to ship out such stocks of goods as they had on hand, and on such day and date, to wit: the said 9th day of December, 1910, these defendants, T. E. Brents and H. F. Coggeshall, acting jointly in the premises, and as your orators state and charge, in connection with the defendant, W. E. Johnson, and under his instructions, and in conjunction with the said Johnson, in the execution of his orders, to direct and command each of the several complainants herein to desist from further engaging in the business of selling and disposing of intoxicating liquors in the city of Bemidji, did then and there order and command each of the said complainants to close up his place of business and to remove and ship out his stock of liquors, of which each of the said complainants then had on hand a quantity, and did command each of these complainants to refrain from further engaging at said city of Bemidji in the business of selling and disposing of intoxicating liquors. That the defendants, and each of them, are now threatening, in case said complainants, or either of them, fail to observe the order so
91 given, to enter upon the premises of each of the said several complainants and to close up the business of said complainants, and each of them, and to destroy the stocks of liquor now in the possession of said complainants, and each of them, and the utensils and wares used and employed in the vending of the same, and to ruin and destroy the established business of each of the said complainants, and the said defendants, and each of them, further threaten, in the event of the refusal of the said complainants, or either of them, to obey and recognize the orders so given, to arrest and cause to be arrested said complainants, and each of them charged with the unlawful introduction, sale, and disposition of intoxicating liquors as in "the Indian country."

That during the fifty-five years elapsing since the making of said treaty of 1855, no effort has been made, either by Federal or State authority until recently, to prevent the introduction into, sale of, and traffic in, intoxicating liquors in any of the territory ceded by the Chippewa Indians to the United States under said treaty of 1855, and no prosecution has been instituted by the United States charging such introduction; and during all said period, and for more than

thirty years last past, licenses have been granted by State and municipal authorities to engage in the sale and disposition of intoxicating liquors in all such territory outside of said reservations, and during all such time the United States Government has accepted and received from persons desiring to engage in such business, special tax on the business of retail liquor dealer in all of said territory, and has issued its receipts therefor, which conferred upon the individuals to whom the same were issued the authority of the United States Government to sell and dispose of intoxicating liquors, in quantities of less than five (5) gallons at a time, and it has only been within the last several months that representatives and
92 agents of the Indian Department have undertaken to prevent the introduction and sale of liquor in said country, or to interfere with, or molest, persons engaged in the sale and disposition of intoxicating liquors in any portion of said ceded territory.

And your orators reiterate that neither of the defendants is a citizen of the State of Minnesota, nor resident thereof, nor has any property therein; and these complainants further say, on information and belief that defendants are not financially responsible, and that any judgment that might be recovered against defendants, or either of them, in an action at law would not be collectible; that these complainants have no remedy against said defendants should they carry out such threats, as aforesaid, than there may be afforded to these complainants in this equitable proceeding; and your orators say that they believe that unless restrained and enjoined by the court from so doing said defendants will proceed to carry out their threats so made, and will, under their assumption of authority so to do, close up the places of business of said complainants and each of them, and will ruin and destroy the business of each of the said complainants and will waste and destroy the stocks of liquor of the said several complainants and the utensils and wares by them used in carrying on such business, and will attempt to carry out their threats to cause the arrest and prosecution of said complainants and each of them, under a charge and charges to be lodged by said defendants and each of them, against said complainants and each of them, of unlawfully selling and disposing of intoxicating liquors in "the Indian country," and of a violation of the provisions of sections 2139 and 2140 of the United States Statutes and amendments thereof.

And your orators further say that, after the making and proclamation of said treaty of 1855, as aforesaid, and on the 7th day of May, 1864, the said Chippewa Indians and the United States
93 entered into another treaty, which treaty was ratified on the 9th day of February, 1865, and was proclaimed on the 20th day of March, 1865, and under and by the terms of article 2 of which treaty, in consideration of the cession to the United States Government by the said Chippewa Indians of certain reservations included within the provisions of the said treaty of 1855, and other

considerations, there was set apart for the future home of the Chippewas of the Mississippi all the lands embraced within the following described boundaries (excepting the reservation made and described in the third clause of the second article of the said treaty of February 22d, 1855, for the Pillager and Lake Winnebagoshish bands); that is to say, beginning at a point one mile south of the most southerly point of Leach Lake and running thence in an easterly course to a point; thence one mile south of the most southerly point of Goose Lake; thence due east to a point due south from the intersection of the Pokagomin Reservation and the Mississippi River; thence on the dividing line between Deer River and Lake Mashkordens River and lakes until a point is reached north of the first-named river and lakes; thence in a direct line northwesterly to the outlet of Two Route Lake; then in a southwesterly direction to Turtle Lake; thence southwesterly to the head water of Rice River; thence northwesterly along the line of the Red Lake Reservation to the mouth of Thief River; thence down the center of the main channel of the Red Lake River to a point opposite the mouth of Black River; thence southwesterly in a direct line with the outlet of Rice Lake to a point due west from the place of beginning; thence to the place of beginning.

Your orators further say that the lands so set apart to the said Chippewas of the Misissippi contained all the territory now within the territorial limits of the city of Bemidji, and all the lands immediately adjacent thereto and distant several miles in all directions therefrom, and that by the terms of said treaty of 1864 the Mis-
94 sissippi band of Chippewa Indians became repossessed of, and the sole owners of, all the lands now within the city limits of the said city of Bemidji, and all the lands immediately adjacent thereto for a number of miles in each and every direction.

Your orators further say that again and on the 19th day of March, 1867, the Chippewas of the Mississippi, being the owners and in possession of the territory last referred to, and the United States Government again entered into another and new treaty which involved the said lands, and which treaty was ratified on the 8th day of April, 1867, and proclaimed on the 18th day of April, 1867, and which treaty was and is in its entirety as follows, towit:

TREATY WITH THE CHIPPEWAS OF THE MISSISSIPPI, 1867.

Articles of agreement made and concluded at Washington, D. C., this 19th day of March, A. D. 1867, between the United States, represented by Louis V. Bogy, special commissioner thereto appointed, William H. Watson, and Joel B. Bassett, United States agent, and the Chippewas of the Mississippi, represented by Que-wo-zance, or Hole-in-the-day, Qui-we-shon-shis, Wau-bon-a-quot, Min-o-do-wob, Mijaw-ko-ko-shik, Shob-osk-kunk, Ka-gway-dosh, Ma-ne-ko-shik, Way-namoe, and O-gub-ay-gwan-ay-aush.

Whereas, by a certain treaty ratified March 20th, 1865, between the parties aforesaid, a certain tract of land was, by the second article thereof, reserved and set apart for a home for the said band of Indians, and by other articles thereof provisions were made for certain moneys to be expended for agricultural improvements for the benefit of said bands; and whereas it has been found that the said reservation is not adapted for agricultural purposes for the use of such of the Indians as desire to devote themselves to such pursuits, while a portion of the bands desire to remain and occupy a part of the aforementioned reservation and to sell the remainder thereof to the United States: Now, therefore, it is agreed—

95 Article 1. The Chippewas of the Mississippi hereby cede to the United States all their lands in the State of Minnesota, secured to them by the second article of their treaty of March 20, 1865, excepting and reserving therefrom the tract bounded and described as follows, towit: Commencing at a point on the Mississippi River, opposite the mouth of Wanoman River, as laid down on Sewall's map of Minnesota; thence due north to a point two miles further north than the most northerly point of Lake Winnebigoshish; thence due west to a point two miles west of the most westerly point of Cass Lake; thence south to Kabekona River; thence down said river to Leech Lake River; thence down the main channel of said river to its junction with the Mississippi River, and thence down the Mississippi to the place of beginning.

And there is further reserved for the said Chippewas out of the land now owned by them such portion of their Western outlet as may upon location and survey be found to be within the reservation provided for in the next succeeding section.

Article 2. In order to provide a suitable farming region for the said bands there is hereby set apart for their use a tract of land to be located in a square form as nearly as possible with lines corresponding to the Government surveys, which reservation shall include White Earth Lake and Rice Lake and contain thirty-six townships of land; and such portions of the tract herein provided for as shall be found upon actual survey to lie outside of the reservation set apart for the Chippewas of the Mississippi by the second article of the treaty of March 20, 1865, shall be received by them in part consideration for the cession of lands made by this agreement.

Article 3. In further consideration of the lands herein ceded, estimated to contain about two million acres, the United States agree to pay the following sums, towit: Five thousand dollars for the erection of school buildings upon the reservation provided for in

96 the second article, four thousand dollars each year for ten years, and as long as the President may deem necessary after the ratification of this treaty, for the support of a school or schools upon said reservation; ten thousand dollars for the erection of a

sawmill, with gristmill attached, on said reservation; five thousand dollars to be expended in assisting in the erection of houses for such of the Indians as shall remove to said reservation.

Five thousand dollars to be expended, with the advice of the chiefs, in the purchase of cattle, horses, and farming utensils, and in making such improvements as are necessary for opening farms upon said reservation.

Six thousand dollars each year for ten years, and as long thereafter as the President may deem proper, to be expended in promoting the progress of the people in agriculture, and assisting them to become self-sustaining by giving aid to those who will labor.

Twelve hundred dollars each year for ten years for the support of a physician, and three hundred each year for ten years for necessary medicines.

Ten thousand dollars to pay for provisions, clothing, or such articles as the President may determine, to be paid to them immediately on their removal to their new reservation.

Article 4. No part of the annuities provided for in this or any former treaty with the Chippewas of the Mississippi bands shall be paid to any half-breed or mixed blood, except those who actually live with their people upon one of the reservations belonging to the Chippewa Indians.

Article 5. It is further agreed that the annuity of $1,000 a year which shall hereafter become due under the provisions of the third article of the treaty with the Chippewas of the Mississippi bands, of August 2, 1845, shall be paid to the chief, Hole-in-the-day, and to his heirs, and there shall be set apart, by selections to be made
97 in their behalf and reported to the Interior Department by the agent, one half section of land each, upon the Gulf Lake Reservation, for Min-e-ge-shig and Truman A. Warren, who shall be entitled to patents for the same upon such selections being reported to the department.

Article 6. Upon the ratification of this treaty, the Secretary of the Interior shall designate one or more persons who shall, in connection with the agent for the Chippewas in Minnesota, and such of their chiefs, parties to this agreement, as he may deem sufficient, proceed to locate, as near as may be, the reservation set apart by the second article hereof, and designate the places where improvements shall be made, and such portion of the improvements provided for in the fourth article of the Chippewa treaty of May 7, 1864, as the agent may deem necessary and proper, with the approval of the Commissioner of Indian Affairs, may be made upon the new reservation, and the United States will pay the expenses of negotiating this treaty, not to exceed ten thousand dollars.

Article 7. As soon as the location of the reservation set apart by the second article hereof shall have been approximately ascertained and reported to the Office of Indian Affairs, the Secretary of the Interior shall cause the same to be surveyed in conformity to the system of Government surveys, and whenever, after such survey,

any Indian of the bands parties hereto, either male or female, shall have ten acres of land under cultivation, such Indian shall be entitled to receive a certificate showing him to be entitled to the forty acres of land, according to legal subdivision, containing the said ten acres, or the greater part thereof, and whenever such Indian shall have an additional ten acres under cultivation, he or she shall be entitled to a certificate for additional forty acres, and so on, until the full amount of one hundred and sixty acres may have been certified to any one Indian; and the lands so held by any Indian shall be exempt from taxation and sale for debt, and shall not be
98 alienated except with the approval of the Secretary of the Interior, and in no case to any person not a member of the Chippewa Tribe.

Article 8. For the purpose of protecting and encouraging the Indians, parties to this treaty, in their efforts to become self-sustaining by means of agriculture, and the adoption of the habits of civilized life, it is hereby agreed that, in case of the commission by any of the Indians of crimes against life or property, the person charged with such crimes may be arrested, upon the demand of the agent, by the sheriff of the county of Minnesota in which said reservation may be located, and when so arrested may be tried, and, if convicted, punished in the same manner as if he were not a member of an Indian tribe.

In testimony whereof, the parties aforementioned, respectively representing the United States and the said Chippewas of the Mississippi, have hereunto set their hands and seals the day and year first above written.

Ratified April 8, 1867.

Proclaimed April 18, 1867.

Your orators further state that the United States has carried out and performed all the obligations assumed by it under the terms of said treaty, and has fully performed the same on its part, and they submit that, under the terms and provisions of said treaty, proclaimed on the 20th day of March, 1865, the lands now within the limits of the said city of Bemidji and adjacent thereto, became absolutely the lands of the Mississippi bands of Chippewa Indians; that said lands were afterward again ceded to the United States, under the provisions of the treaty proclaimed April 18th, 1867, which cession was made without any restrictions or limitations whatever, and without any provisions relative to the introduction of intoxicating liquors into or sale thereof in such territory; and that by reason thereof, and of the premises since the making of the said treaty of 1867, as aforesaid, the provisions of sections 2139 and 2140 of the United States Statutes and amendments thereof, are not operative within said territory whereon stands the said city of Bemidji, and the same is not Indian country within the meaning of said sections,
99 and that said defendants, in attempting to prevent these complainants from further continuing their business hereinbefore referred to are, and each of them is, acting without authority.

And your orators further allege that in and by an act of Congress entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota," approved January 14, 1889, the President was authorized and directed to appoint three commissioners to negotiate with the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and relinquishment of all their title and interest in and to all their reservations in said State, except the White Earth and Red Lake Reservations and to all and so much of these two reservations as in the judgment of said commissioners was not required to make the allotments provided for by said act. And it was further provided in and by said act that the acceptance and approval of the cession and relinquishment provided for therein by the President should operate as a complete extinguishment of the Indian title without any further act or ceremony whatsoever for the purposes and upon the terms provided in said act.

And your orators further aver that pursuant to the provisions of the said act, the President duly appointed three commissioners to negotiate with the said band of Chippewa Indians for the cession and relinquishment of their said reservations and that at divers times between the 8th day of July and the 12th day of November, 1889, agreements were entered into between said commissioners on the part of the United States and the several bands of Chippewa Indians wherein and whereby the said Indians accepted, consented to, and ratified the said act of February 14, 1889, and each and all of the provisions thereof, and granted, ceded, relinquished, and conveyed to the United States, all their right, title, and interest in and to all of the Grand Portage, Fond du Lac, Nett Lake, Deer Creek, Leech Lake, Winnibegoshish, and Chippewa Reservations and in like manner ceded, relinquished, and conveyed to the United States all their right, title, and interest in and to four townships of the White Earth Reservation and the greater part of the Red Lake Reservation, and that said agreements and cessions were duly approved by the President on the 4th day of March, 1890.

100 And your orators further show that upon the approval of the agreements and cessions above mentioned by the President, the Indian title in and to all the lands thereby ceded was absolutely and completely extinguished, without any condition or limitation whatsoever, save only that the said lands were subject to disposal in the manner and for the purposes provided in said act and not otherwise.

Your orators further say that at the time of the making of the treaty of 1855, hereinbefore referred to, the lands ceded by the Chippewa Indians under said treaty then were and constituted a vast wilderness, altogether uninhabited by any civilized people; that since the making of said treaty and the acquisition of the territory therein ceded within the limits of the State of Minnesota, the country so ceded, with the exception of segregated portions thereof included within the reservations retained by the Indians under treaties be-

tween said Indians and the United States, has been largely developed, gradually at first, but with phenomenal rapidity within the last fifteen years, and with the exception of a portion of such territory now included within the Red Lake Reservation, all of said lands have become populated with white and civilized people, and excepting such reservation, all such territory has been opened up to settlement, and with the exception of a few square miles of land remote from railroads and streams, all such territory is organized into political subdivisions under such organized form of Government as is prescribed by the laws of the State of Minnesota, and in the various communities in said territory, except in very remote portions thereof, the degree of civilizations is as advanced as in older portions of said State, and in the larger portion of said territory various branches of industry have been established and commercial interests have grown up and the circumstances existing at the time of the making of said treaty of 1855 have materially and completely changed. That according to the returns of the United States census of 1910, there is now in the counties affected by said treaty of 1855, a total white population of 382,191.

And your orators further say and represent that a large strip of territory completely surrounding the said Red Lake Reservation, the said strip of land being a part of the Red Lake Reservation ceded to the United States during the year 1890, under and pursuant to the provisions of the act of Congress of January 14, 1889, as
101 hereinbefore stated, is now and is admitted by the officials of the United States Government to be, exempt from the provisions of any treaty relative to the introduction of intoxicating liquors into "the Indian country," and that the sale of intoxicating liquors in the territory between the said Red Lake Reservation and the said city of Bemidji and the territory immediately surrounding the same is permitted by the U. S. Government, and there is and exists a strip of land about fifteen miles in width, into which it is lawful, and so admitted by the Interior Department of the United States, to introduce intoxicating liquors, and in which territory there now is, and for more than six years last past have been, seven saloons engaged in selling intoxicating liquor of all kinds. That two of said saloons are within one and one-half miles of the southern boundary of the Red Lake Indian Reservation, and in said territory and within three miles of said reservation are three saloons selling intoxicating liquors that were conducted and in operation more than twelve years ago, and in order to reach the said city of Bemidji it is necessary for such Indians as reside on said Red Lake Reservation to cross over the said strip of territory so opened and recognized to be open to the sale of and traffic in intoxicating liquors.

That if such Indians travel by railroad to points outside of said reservation, and especially to said city of Bemidji, they must pass on

one line of railway two saloons, and upon the other line of railway four saloons within said territory into which it is lawful to introduce intoxicating liquors.

And may it please your honors to grant unto your orators a writ of subpoena of the United States of America issuing out of and under the seal of this honorable court, directed to the said defendants, W. E. Johnson, T. E. Brents, and H. F. Coggeshall, and thereby commanding them, and each of them, on a certain day to be therein named, and under a certain penalty, to be and appear before this honorable court and then and there to answer, but not under oath—such oath being expressly waived—all and singular, and that each stand to perform and abide by such order, direction, and decree as may be made against them in the premises, and as shall seem to your honors to be meet and agreeable to equity and good conscience.

And your orators pray that a temporary injunction may issue against the said defendants, W. E. Johnson, T. E. Brents, and H. F. Coggeshall, enjoining and restraining them, and each of them and each of their agents, servants, employees, and deputies, and all persons claiming to act by, through, and under them, from going upon the respective premises of the said several complainants particularly described herein, and from molesting or interfering with them, or either of them, in the conduct of their business as saloon-
102 keepers, or in conducting bars and in selling and disposing of vinous, spirituous, malt, and other intoxicating liquors, including beer, ale, and porter, while engaged in said business and in conducting the same with persons having no Indian blood, and under the pretense and claim that it is unlawful to sell and dispose of said liquors in the territory embraced within the limits of the said city of Bemidji, and from taking into their possession, or molesting or interfering with, seizing, or destroying any of the stock or stocks on hand or in the possession of either of the said complainants, or any of the personal property of said complainants used in connection with such business, either now situated upon said premises or which complainants may hereafter acquire, place, or keep within any building upon either of said premises.

May it please your honors to grant unto your orators a writ, or writs, of injunction, issuing out of your honorable court, or issued by one of your honors, according to the ordinary course and practice of this court in such cases made and provided, directing, commanding, enjoining, and restraining said defendants, their agents, servants, deputies, and all persons claiming to act for, *thru*, or under them, and each and every person whomsoever, from going upon the respective premises of said complainants, particularly described herein, or to which they may remove in the said city, and from molesting or interfering with them, or either of them, in the conduct of their business as saloon-keepers, or in conducting bars, and in selling and

disposing of vinous, spirituous, malt, and other intoxicating liquors, including beer, ale, and porter, while engaged in said business, and in conducting the same with persons having no Indian blood, and under the pretense and claim that it is unlawful to sell and dispose of said liquors in the territory embraced within the limits of the said city of Bemidji, and from taking into their possession, or molesting or interfering with, seizing, or destroying any of the stock or stock on hand or in the possession of either of the said complainants, or any of the personal property of said complainants used in connection with such business, whether as now situated upon said prem-
103 ises or which complainants may hereafter acquire, place, or keep within any building on either of said premises.

And your orators further pray that until said temporary injunction shall issue, your honors may issue a temporary restraining order against said defendants, and each of them, and their agents, servants, deputies, and all persons claiming to act, or acting for, *thru*, or under them, and in form and to the effect above prayed for; and may it please your honors to grant unto your orators such other and further relief as the facts and circumstances of the case warrant and require, and to this honorable court shall seem meet, and your orators, as in duty bound, will ever pray.

SPOONER & BROWN,
E. E. MCDONALD,
Solicitors for Complainants.

104 STATE OF MINNESOTA, }
COUNTY OF BELTRAMI. } *ss.*

Edwin Gearlds and John A. Dalton, being each duly sworn according to law, severally depose and say: I am one of the complainants mentioned in the foregoing bill and have read the same, and the same is true of my own knowledge, except such matters as are therein stated on information and belief, and as to such matters I believe it to be true.

EDWIN GEARLDS.
JOHN A. DALTON.

Subscribed and sworn to before me this 27th day of March, 1911.
[SEAL.] E. E. MCDONALD,
Notary Public, Beltrami County, Minnesota.
My commission expires May 16th, 1917.

(Indorsed:) Filed Mch. 28, 1911. Henry D. Lang, clerk, by Geo. F. Hitchcock, jr., deputy.

105 And on April 20th, 1912, the following reamended answer was filed of record in said cause, to wit:

106 In the District Court of the United States, District of Minnesota, Fourth Division. No. 1007.

EDWIN GERALDS, L. J. KRAMMER, FRED E. Brinkman, E. E. Geralds, Albert Marshik, John A. Dalton, Edwin Fay, F. S. Lycan, John H. Sullivan, Harry Gunsalus, J. E. Maloy, and Tillie Larson, complainants,
vs.
W. E. JOHNSON, T. E. BRENTS, AND H. F. Coggeshall, defendants.
} Reamended answer.

The joint and several reamended answer of William E. Johnson, Thomas E. Brents, and Harold F. Coggeshall, the defendants, to the amended bill of complaint of the complainants in the foregoing entitled action.

These defendants, respectively, now and at all times saving to themselves all and all manner of benefits and advantages of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, severally answer, saying:

These defendants upon information and belief admit that the plaintiffs are each and all residents of the city of Bemidji, in the county of Beltrami, in the State of Minnesota, and severally engaged in the business of saloon-keeper and in selling at retail spirituous, vinous, and malt liquors in the several places and buildings in said city mentioned, and that said plaintiffs, and each of them, complied with the laws of the State of Minnesota, prescribing the conditions under which a citizen of said State is authorized to engage in the business of selling intoxicating liquors at retail, as more particularly set forth and described in said bill of complaint.

Upon information and belief, the defendants further admit that the value of the business and property of the several plaintiffs in controversy in this suit exceeds the sum of two thousand dollars ($2,000.00), exclusive of interests and costs, as stated and alleged in said bill.

107 These defendants, respectively, do not know and can not set forth as to his or either of their beliefs, or otherwise, whether or not it is a fact that the plaintiffs, or any of them, have complied with and observed all the laws of the United States and of the State of Minnesota providing against the sale of liquor to Indians, but these defendants deny that the plaintiffs have endeavored to obey and have obeyed and observed all the laws of the United States regulating the sale and traffic in intoxicating liquors, and aver that the plaintiffs, and each of them, have, in disregard and in violation of article 7 of the said treaty of February 22, 1855, referred to and set out in full

in said bill of complaint, and of the laws of the United States referred to in said bill, unlawfully introduced and caused to be introduced into the said city of Bemidji spirituous, vinous, and malt liquors, which these defendants allege is in Indian country. These defendants further admit that during all the time intervening since the making of the treaty between the United States and the Chippewas of the Mississippi on the 19th day of March, 1867, and proclaimed April 18, 1867, the United States has, through its Internal Revenue Bureau, issued within the whole of said territory receipts for special tax on the business of retail liquor dealers upon application therefor and the payment of such special tax.

These defendants, upon information and belief, and for the purposes of this suit, further say that the allegations of said bill, descriptive of the conditions now existing in the territory comprised within the exterior boundaries of the cession made under the said treaty of February 22, 1855, with respect to the organization of said territory into counties, towns, villages, and cities, and the construction and operation into and through the same of railroads, the settlement therein of white people, the erection of buildings, the values of property, and the growth in wealth and population, are substantially true and correct, as in said bill set forth. These defendants further admit that since the said treaty between the United States and the Chippewas of the Mississippi, proclaimed April 18, 1867, all lands therein ceded by said Indians to the United States have been public lands open to entry and settlement under the public land laws of the United States.

For their further answer to said bill these defendants say that certain lands were set apart for the use and occupancy of the Chippewa Indians of Minnesota under the provisions of the treaties in said bill referred to and particularly described and therein
108 designated as White Earth and Leech Lake Reservations; that upon each body of said lands an agency is maintained by the United States for the supervision of the business and affairs of said Indians and the disbursement of annuities due them from the Government, and at each agency the United States maintains a superintendent and special disbursing agent with offices and a corps of clerks, as well as schools for the education of the Indian children; that at the White Earth Agency 5,600 Indians are carried on the annuity rolls, and at the Leech Lake Agency the names of 1,750 Indians appear upon such rolls; that the majority of these Indians reside upon the lands embraced within the said reservations as defined by said treaties, and which lands when so reserved were within the boundaries of the ceded territory under the said treaty of 1855.

These defendants admit that in consequence of the elevation of said Indians to the plane of citizenship by operation of the general allotment act of February 8, 1887, tribal relations among said Indians have ceased to exist, and their former unity and organization for the regulation and government of tribal affairs have disappeared, except in so far as the same may be deemed to continue

by reason of the following facts: The Indian appropriation acts of April 30th, 1908 (35 Stat., 70 to 82); March 3rd, 1909 (35 Stat., 792); April 4th, 1910 (36 Stat., 269, 276); March 3rd, 1911 (36 Stat., 1056 to 1065), have made appropriations to the executive committee of the White Earth band of Chippewa Indians in Minnesota out of the funds belonging to said band. The United States maintains two resident agents among these Indians, viz, Major John R. Howard, at White Earth, Minnesota, and Mr. John T. Giegoldti, Leech Lake Agency, at Onigum, Minnesota, whose duties and powers are prescribed by chapter 1, title 28, of the Revised Statutes of the United States, and by regulations of the Indian Office of 1904 approved by the Secretary of the Interior. The United States also maintains schools among these Indians for their education and civilization, viz, at Leech Lake, a boarding school at old agency, Squawpoint; Sugar Point; White Earth, a boarding school, at Pine Point; Wild Rice River; Beaulieu; Buffalo River; Elbow Lake; Poplar Grove; Pottersville; Round Lake; and White Earth, having together an average attendance of 454 pupils, all of which agencies for the civilization and elevation of said Indians are maintained by the United States for the discharge of its duties to its Indian wards and in intended exercise of its powers granted by the Constitution of the United States.

109 That the schools herein referred to are maintained out of the trust fund created by section 7 of the Nelson Act of January 14, 1889.

That said agent at White Earth Agency is paid from the treaty appropriation for support of Chippewas of the Mississippi according to the act of March 3, 1911 (36 Statutes L., 276).

That the agent at Leech Lake Agency is paid from interest on Chippewa funds pursuant to section 7 of the act of January 14, 1899 (25 Statutes L., 645).

The defendants further admit that any monies now paid to any of the Chippewa Indians in the way of annuities or otherwise are not paid under any of the provisions of the said treaty of February 22, 1855, but, on the contrary, all monies now and for many years past paid by the Government to and received by any of such Indians are paid and received under acts of Congress and the treaties made between such Indians and the Government subsequent to and independently of said treaty of 1855.

These defendants, upon information and belief, and for the purposes of this suit, admit that the Indians residing upon and occupying the territory comprised in said cession of 1855, including said White Earth and Leech Lake Reservations, are, generally speaking, either allottees under acts of February 8, 1887, and January 14, 1889, or descendants of such allottees, and that said reservations are principally allotted to the Indians entitled to such allotments, and a large portion of said White Earth Reservation is now owned in fee by white men and Indians; and with respect to the lands lying within the boundaries of the territory defined by said treaties estab-

lishing the White Earth and Leech Lake Reservations, conditions thereon and therein are substantially as set forth and represented in complainant's said bill.

These defendants further say that the Indians above referred to are the same Indians, or descendants of the bands of Indians, that were parties to the said treaty of February 22, 1855, and the subsequent treaties particularly referred to in said bill of complaint; that for the purposes of business, pleasure, hunting, trapping, or other diversions, said Indians traverse parts of the region comprised in said cession of 1855, and so visit a large number of towns, villages, and cities in said territory, including the city of Bemidji, at which municipalities spirituous, vinous, and malt liquors are vended at retail with the permission and consent of and as regulated by the statutes of the State of Minnesota, and further admit that by the laws of the State the sale of intoxicating liquor to any person of Indian blood is punishable as a gross misdemeanor and felony.

110 These defendants, further answering, admit, as in said bill stated, that there is a strip of land lying between Red Lake Reservation and the city of Bemidji which is not subject to any law or treaty of the United States prohibiting the introduction of intoxicating liquor therein, and upon information and belief these defendants say that saloons are being operated upon and within said open unrestricted territory, over which the United States has no control, as more particularly set forth in said bill.

These defendants deny that the several acts of Congress and treaties mentioned in said bill and which were enacted and promulgated subsequent to said treaty of 1855, repealed or in any wise modified said article 7 of said treaty of 1855, prohibiting the introduction of intoxicating liquor into the territory thereby ceded, and aver that none of said laws and treaties, or any law or treaty enacted by Congress or promulgated by the President of the United States, has repealed, modified, changed, or weakened the force and effect of said article 7 and the laws of the United States prohibiting the introduction of intoxicating liquor into said ceded territory, which these defendants allege is by virtue thereof Indian country.

Further answering, these defendants, upon information and belief, admit that the plaintiffs have respectively established a business in said city of Bemidji as set forth in said bill of complaint, and that the said business of the several plaintiffs will be affected by the threatened or intended acts of these defendants, unless restrained or enjoined from so doing, and that the plaintiffs have a common interest in this suit in which they are joined to avoid a multiplicity of actions, and the defendants further admit that they are respectively citizens and residents of States other than Minnesota, as alleged in said bill. These defendants admit and aver that at no time since the cession by the Chippewa Tribe of Indians of the Mississippi by treaty set forth in the bill herein, ratified April 8, 1867, and proclaimed April 18, 1867, of lands therein described, until September

17, 1909, did the United States Government or its officers attempt to enforce within the said territory any provisions of article 7 of the treaty made between the United States and the Mississippi, Pillager, and Lake Winnebegoshish Bands of Chippewa Indians, made and concluded February 22, 1855, or any law of the United States relating to the introduction of vinous, spirituous, or malt liquors into the Indian country, except that in 1905 the United States
111 instituted criminal prosecution against one Hugh Funk for having introduced in violation of section 7 of said treaty intoxicating liquors into the village of Ball Club, which is within said cession of February 22, 1855.

The defendants aver that on September 17, 1909, said William E. Johnson, as chief special officer of the United States Indian Service, issued an order calling attention to article 7 of the treaty with the Chippewa Indians of February 22, 1855, and gave notice that the provisions of said section would be enforced in the whole portion of Cass County, Minnesota, lying above Township 138 north, warning all liquor dealers north of said Township 138 to close their saloons and remove all their intoxicating liquors to points outside of said district of Cass County before October 17, 1909.

That on November 29, 1909, said chief special officer gave like notice that after December 27, 1909, said article 7 of said treaty would be enforced throughout those districts of the State of Minnesota described as all of Becker and Hubbard Counties, all of Itasca County west of range 26 and south of Township 147 north, all of Norman County east of range 45, all of Polk County east of range 45 and south of Township 148 north, and all of Clearwater County south of Township 148 north.

That on January 15, 1910, said chief special officer, for information of liquor dealers, published a list of railway stations in Minnesota, within the territory ceded by said treaty of February 22, 1855, in which, assuming to act for the Government, he and his associates were enforcing and attempting to enforce the provisions of said treaty excluding introduction of intoxicating liquors in said ceded territory.

That on April 8, 1910, said chief special officer gave notice that said article 7 of said treaty would be enforced throughout those districts of Minnesota described as all of Becker, Hubbard, and Mahnomen Counties, and those portions of counties of Beltrami south of Township 148 north and west of range 33; Cass, Crow Wing, Otter-tail, and Wadena north of Township 136, Clay north of Township 139 east of range 46, Clearwater south of Township 148 north, Itasca south of Township 147 north and west of range 26 west of the fourth principal meridian, Norman south of Township 148 north and east of range 45.

That all such acts and orders of said chief special officer were by direction and approval of the Commissioner of Indian Affairs, and in enforcement of such orders 275 saloons were closed within this

territory, six saloon keepers were indicted, and about 1,300 gallons of whiskey were destroyed.

112 These defendants admit that each and all of the terms and provisions of the act of Congress entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota," approved January 14, 1889, generally known as the Nelson Act, and each and all of the terms and provisions of the act of Congress entitled "An act to provide allotments to Indians on White Earth Reservation in Minnesota," approved April 28, 1904, generally known as the Steenerson amendment, were by the several bands of Indians therein named and thereby affected, duly approved, accepted, and ratified; and substantially everything required to be done under said acts of Congress, either by the United States or the President thereof, or by either of the several bands of Indians, has been done to make and render each of the several terms and provisions of said acts operative and effective, and thereby the Indian title to all the lands mentioned or described in either of said acts became completely extinguished, except that there are some allotments which are being exchanged for benefit of some of said Indians, so that to the extent of such exchange of some allotments the provisions of said acts have not been fully complied with or work of such allotment fully closed.

These defendants further say that all the acts and things set forth and complained of in said bill as having been done or threatened to be done and performed by these defendants were each and all done, threatened, or intended, as claimed by these defendants, in the execution of the duties devolved upon them respectively as special officers of the United States, appointed thereto by the honorable Secretary of the Interior, for the suppression of the liquor traffic among Indians, agreeably to the laws of the United States enacted for the accomplishment of that end, and that they have not, and do not intend to do any act or thing, either as alleged in said bill of complaint or otherwise except as authorized and directed by the said laws of the United States pursuant to their respective appointments as officers of the United States charged with the duty of enforcing said laws and treaties, whereby the introduction of intoxicating liquors into Indian country is declared unlawful, and these defendants aver that the city of Bemidji, named in said bill, is situate within Indian country within the spirit and intent of said treaty and the laws of the United States prohibiting the introduction of intoxicating liquors into Indian country and providing for its seizure and condemnation when found therein.

113 And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by said bill charged, without this: that there is any other matter, cause, or thing in the said plaintiff's bill of complaint contained, material or necessary for these defendants to make answer unto and not herein or hereby well and sufficiently answered, confessed, traversed, and

avoided or denied, is true to the knowledge and belief of these defendants; all which matters and things these defendants are ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

CHARLES C. HOUPT,
United States Attorney and Solicitor for Defendants.

(Indorsed:) Filed Apr. 20, 1912.

114 And on the same day the following stipulation submitting the cause upon the amended bill and reamended answer was filed of record in said cause, to wit:

115 In the District Court of the United States, District of Minnesota, Fourth Division, No. 1007.

EDWIN GEARLDS, L. J. KRAMER, FRED E. BRINKMAN, E. E. Gearlds, Albert Marshik, John A. Dalton, Edwin Fay, F. S. Lycan, John H. Sullivan, Harry Gunsalus, J. E. Maloy, and Tillie Larson, complainants,
v.
W. E. JOHNSON, T. E. BRENTS, AND H. F. COGGESHALL, defendants.
} Stipulation.

It is stipulated and agreed in the action above entitled:

I. That the time in which the defendants may file their reamended answer is extended to include the 20th day of April, 1912.

II. That said cause be, and hereby is, submitted to the court upon the amended bill and reamended answer filed herein for hearing and determination without further pleadings or proceedings and a decree rendered upon said bill and answer; that said cause is hereby set down for hearing before said court at the post-office building in the city of Minneapolis, in said State and district, on Saturday, the 20th day of April, 1912, at ten o'clock a. m.

CHARLES C. HOUPT,
Solicitor for Defendants.
MARSHALL A. SPOONER & E. E. MCDONALD,
Solicitors for Complainants.

Dated St. Paul, Minn., April 18th, 1912.

(Endorsed:) Filed Apr. 20, 1912. Charles L. Spencer, clerk, by Geo. F. Hitchcock, jr., deputy.

116 And on the same day the following judgment and decree was filed and entered of record in said cause, to wit:

117 In the District Court of the United States, District of Minnesota, Fourth Division. No. 1007.

EDWIN GEARLDS, L. J. KRAMMER, FRED E. BRINKMAN, E. E. Gearlds, Albert Marshik, John A. Dalton, Edwin Fay, F. S. Lycan, John H. Sullivan, Harry Gunsalus, J. E. Maloy, and Tillie Larson, complainants,

vs.

W. E. JOHNSON, T. E. BRENTS, and H. F. COGGESHALL, defendants.

This cause came on to be further heard at the April, 1912, term of this court on the twentieth day of April, 1912, at ten o'clock a. m., and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

That the temporary injunction heretofore issued in the said cause be and the same hereby is made permanent and the defendants above named and each of them are hereby enjoined and restrained, and each of their agents, servants, deputies, and all persons claiming to act for, through, or under them, is and are enjoined and restrained from going upon the respective premises of the said complainants particularly described in the bill in said action or to which either of the said complainants may remove in the city of Bemidji, Beltrami County, Minnesota, and from molesting or interfering with the complainants or either of them in the conduct of the business of either of them as saloon keeper or in conducting bars and selling and disposing of vinous, spirituous, malt, and other intoxicating liquor, including beer, ale, and porter, while engaged in said business, and in conducting the same with persons having no Indian blood, either under the

118 pretense and claim that it is unlawful to sell and dispose of any of such liquors, beer, ale, or porter in the territory embraced within the limits of the said city of Bemidji or at all, and from taking into their or either of their possession or molesting or interfering with, seizing, or destroying any of the stock or stocks of such liquors, beer, ale, or porter on hand, or in possession of either of the said complainants, or from taking into possession or molesting or interfering with, seizing, or destroying any of the personal property of either or any of said complainants, used in connection with either or any of the kinds of business hereinbefore mentioned, whether the same is conducted upon any of the premises hereinbefore referred to or upon premises which complainants, or either of them, may hereafter acquire in said city of Bemidji.

Dated April 20, 1912.

CHARLES A. WILLARD, *Judge.*

An exception is allowed defendants to the entry of the foregoing decree.

CHARLES A. WILLARD, *Judge.*

(Endorsed:) Filed Apr. 20, 1912. Charles L. Spencer, clerk, by Geo. F. Hitchcock, jr., deputy.

119 And on May 20th, 1913, the following papers on appeal were filed in said cause, to wit: Petition for appeal and order

allowing same, assignment of errors, stipulation waiving bond on appeal, and citation with admission of service thereon.

120 In the District Court of the United States, District for Minnesota, Fourth Division. No. 1007.

EDWIN GERALDS, L. J. KRAMMER, FRED E. BRINKMAN, E. E. Geralds, Albert Marshik, John A. Dalton, Edwin Fay, F. S. Lycan, John H. Sullivan, Harry Gunsalus, J. E. Maloy, and Tillie Larson, complainants and appellees,

vs.

W. E. JOHNSON, T. E. BRENTS, AND H. F. COGGESHALL, defendants and appellants.

PETITION FOR APPEAL.

Comes now W. E. Johnson, T. E. Brents, and H. F. Coggeshall, defendants and appellants in the above-entitled cause, and, conceiving themselves aggrieved by the decree of the district court made and entered in the above-entitled cause on the 20th day of April, 1912, by the United States District Court for the District of Minnesota, Fourth Division, do hereby appeal from said decree of said United States District Court to the Supreme Court of the United States; and these appellants pray that said appeal may be allowed and that a transcript of the record and proceedings herein and upon which said decree was made and entered, duly authenticated, may be transmitted to the United States Supreme Court.

Dated May 12, A. D. 1913.

CHARLES C. HAUPT,
United States Attorney, and
Solicitor for Defendants and Appellants.

And now, to wit, on this 12th day of May, A. D. 1913, it is Ordered, that the above appeal in the above-entitled cause be, and it is hereby, allowed as prayed.

CHARLES A. WILLARD,
District Judge.

(Indorsed:) Filed May 20, 1913.

121 In the District Court of the United States, District of Minnesota, Fourth Division. No. 1007.

EDWIN GERALDS, L. J. KRAMMER, FRED E. BRINKMAN, E. E. Geralds, Albert Marshik, John A. Dalton, Edwin Fay, F. S. Lycan, John H. Sullivan, Harry Gunsalus, J. E. Maloy, and Tillie Larson, complainants and appellees,

vs.

W. E. JOHNSON, T. E. BRENTS, AND H. F. COGGESHALL, defendants and appellants.

ASSIGNMENT OF ERRORS.

Comes now the above-named defendants and appellants, W. E. Johnson, T. E. Brents, and H. F. Coggeshall, and make and file the following assignment of errors, upon which they will rely in their

appeal from the decree of the court above named, made and entered herein, on the 20th day of April, 1912, as follows, to wit:

I. The court erred in holding and deciding in its decision overruling the defendants' demurrer to the plaintiffs' bill of complaint, as follows:

"I can come to only one conclusion in the case, and that is that the provision in article 7 of the treaty of 1855, which prohibited the introduction of intoxicating liquors into ceded territory, was repealed by the act admitting Minnesota into the Union."

II. The court erred in overruling the demurrer to complainants' bill of complaint.

III. The court erred in its order granting a temporary injunction as prayed in plaintiffs' bill of complaint.

IV. The court erred in adjudging and decreeing that the temporary injunction be made permanent.

V. The court erred in the entry of the final decree in the above-entitled cause.

122 VI. The court erred in making and entering a decree restraining the defendants and appellants from proceeding in the discharge of their duties as set forth in their answer herein.

VII. The court erred in decreeing that the city of Bemidji, mentioned in the complainants' bill of complaint, was not subject to the restrictions provided for in said article 7 of the treaty of 1855.

VIII. The court erred in not entering a decree herein dismissing the complainants' bill of complaint.

Wherefore the defendants and appellants, W. E. Johnson, T. E. Brents, and H. F. Coggeshall, pray that said decree of the District Court of the United States for the District of Minnesota, Fourth Division, be reversed with directions to enter decree in favor of defendants and appellants, and against the complainants and appellees in accordance with the prayer of this appeal and the prayer of the amended answer of defendants in this cause.

CHARLES C. HOUPT,
United States Atorney and Solicitor for Defendants and Appellants.

(Indorsed): Filed May 20th, 1913.

123 In the District Court of the United States, District for Minnesota, Fourth Division. No. 1007.

EDWIN GERALDS, L. J. KRAMMER, FRED E. BRINKMAN, E. E. Geralds, Albert Marshik, John A. Dalton, Edwin Fay, F. S. Lycan, John H. Sullivan, Harry Gunsalus, J. E. Maloy, and Tillie Larson, complainants and appellees,

vs.

W. E. JOHNSON, T. E. BRENTS, AND H. F. COGGESHALL, defendants and appellants.

STIPULATION.

It is hereby stipulated and agreed by and between the parties to the cause above entitled, by their respective solicitors, that the mak-

ing and filing of a bond herein by appellants is hereby waived and that the failure to file an appeal bond herein shall work no detriment to the appellants upon this appeal.

It is further stipulated that the complainants and appellees shall not be considered to have waived any other rights to which they may be entitled by reason of this stipulation, nor to have consented to said appeal by reason of this stipulation.

E. E. McDONALD,
Solicitor for Complainants and Appellees.

CHARLES C. HOUPT,
United States Attorney and Solicitor for Defendants and Apellants.

Dated May 16, 1913.
(Indorsed): Filed May 20th, 1913.

124 In the District Court of the United States, District for Minnesota, Fourth Division. No. 1007.

EDWIN GERALDS, L. J. KRAMMER, FRED E. BRINKMAN, E. E. Geralds, Albert Marshik, John A. Dalton, Edwin Fay, F. S. Lycan, John H. Sullivan, Harry Gunsalus, J. E. Maloy, and Tillie Larson, complainants and appellees,
vs.
W. E. JOHNSON, T. E. BRENTS, AND H. F. COGGESHALL, defendants and appellants.

CITATION.

UNITED STATES OF AMERICA, *ss:*

To Edwin Geralds, L. J. Krammer, Fred E. Brinkman, E. E. Geralds, Albert Marshik, John A. Dalton, Edwin Fay, F. S. Lycan, John H. Sullivan, Harry Gunsalus, J. E. Maloy, and Tillie Larson, complainants and appellees, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the City of Washington, in the District of Columbia, within 60 days from the date hereof, pursuant to an appeal duly taken and allowed from that certain decree of the District Court of the United States for the District of Minnesota, Fourth Division, in that certain cause wherein W. E. Johnson, T. E. Brents, and H. F. Coggeshall are defendants and appellants, and you, the said Edwin Geralds, L. J. Krammer, Fred E. Brinkman, E. E. Geralds, Albert Marshik, John A. Dalton, Edwin Fay, F. S. Lycan, John H. Sullivan, Harry Gunsalus, J. E. Maloy, and Tillie Larson are complainants and appellees, to show cause, if any there be, why the decree mentioned should not be set aside and corrected, and why speedy justice should not be done the parties in that behalf.

Witness the honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 12th day of May, A. D. 1913.

CHARLES A. WILLARD,
District Judge.

125 STATE OF MINNESOTA,
County of Beltrami, ss:

Hiram A. Simons, being first duly sworn, deposes and says that on the 13th day of May, 1913, at 3 o'clock p. m. of said day, he served the attached citation upon Marshal A. Spooner, Esq., at his office in the city of Bemidji, in the county and State aforesaid, by handing to and leaving with the said Marshal A. Spooner a true and correct copy thereof.

[SEAL.] HIRAM A. SIMONS.

Subscribed and sworn to before me this 16th day of May, A. D. 1913.

T. C. BAILEY,
Notary Public, Beltrami County, Minn.

My commission expires 3-22-1920.

126 STATE OF MINNESOTA,
County of Beltrami, ss:

Hiram A. Simons, being first duly sworn, deposes and says that on the 16th day of May, 1913, at 10 o'clock a. m. of said day, he served the attached citation upon Elmer E. McDonald, Esq., at his office in the city of Bemidji, in the county and State aforesaid, by handing to and leaving with the said Elmer E. McDonald a true and correct copy thereof.

[SEAL.] HIRAM A. SIMONS.

Subscribed and sworn to before me this 16th day of May, A. D. 1913.

T. C. BAILEY,
Notary Public, Beltrami County, Minn.

My commission expires 3-22-1920.

127 (Indorsed:) Service of the within and foregoing citation is hereby admitted at Bemidji, Minnesota, this 16th day of May, A. D. 1913. E. E. McDonald, attorney and solicitor for complainants. Filed May 20, 1913. Charles L. Spencer, clerk, by Clara M. Owens, deputy.

128 And on July 7th, 1913, the following order, enlarging the time for docketing the appeal in this cause, was filed of record with the clerk of the Supreme Court of the United States, to wit:

129 In the District Court of the United States, District of Minnesota, Fourth Division.

EDWIN GERALDS, L. J. KRAMER, FRED E. BRINKMAN, E. E. Gearlds, Albert Marshik, John A. Dalton, Edwin Fay, F. S. Lycan, John H. Sullivan, Harry Gunsalus, J. E. Maloy, and Tillie Larson, complainants and appellees, *vs.* W. E. JOHNSON, T. E. BRENTS, AND H. F. COGGESHALL, defendants and appellants.	United States Circuit Court, No. 1007. In equity.

For good cause shown, I, Charles A. Willard, judge of said court, who signed the citation in the above-entitled action, requiring the above-named complainants and appellees to be and appear at the Supreme Court of the United States within sixty days from the 12th day of May, A. D. 1913, do hereby enlarge the time within which the above-named defendants and appellants may docket said action and file the record thereof with the clerk of said Supreme Court of the United States for a period of sixty days, so that said action may be so docketed and said record thereof so filed with said clerk on or before the 9th day of September, A. D. 1913.

CHARLES A. WILLARD,
United States District Judge.

Dated, Minneapolis, Minn., July 7, 1913.
(Indorsed:) Filed July 7, 1913.

130 And on August 1st, 1913, the following praecipe for a transcript of certain papers for delivery to the Solicitor General of the United States was filed of record in said cause to wit:

131 United States District Court, District of Minnesota, Fourth Division.

EDWIN GEARLDS ET AL., COMPLAINANTS AND APPELLEES, *v.* W. E. JOHNSON ET AL., DEFENDANTS AND APPELLANTS.	In equity, No. 1007.

The clerk of said court will please make a transcript of the following papers in the above-entitled cause to be delivered to me for transmission to the Solicitor General of the United States, viz:

1. Amended bill of complaint of January 9, 1911.
2. Demurrer to amended bill.
3. Order overruling demurrer and exception thereto.
4. Opinion of court overruling demurrer.
5. Order for temporary injunction.
6. Amended bill filed March 28th, 1911.
7. Reamended answer filed April 20, 1912.

8. Stipulation submitting case on bill and answer.
9. Final decree.
10. Appeal papers.

CHAS. C. HOUPT,
United States Attorney and Attorney for Appellees.
(Indorsed:) Filed Aug. 1st, 1913.

132 United States of America, District Court of the United States, District of Minnesota, Fourth Division.

I, Charles L. Spencer, clerk of said District Court, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing, consisting of 131 pages, numbered consecutively from 1 to 131, inclusive, is a true and complete transcript of such records, process, pleadings, orders, final decree, and other proceedings in said cause as are called for in the praecipe of the United States attorney, a copy of which is hereto attached, and of the whole thereof, as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof.

In witness whereof, I have hereunto set my hand, and affixed the seal of said court, at Minneapolis, in the District of Minnesota, this 14th day of August, A. D. 1913.

[SEAL.]

CHARLES L. SPENCER, *Clerk.*
By GEO. F. HITCHCOCK, JR.,
Deputy Clerk.

(Indorsement on cover:) File No. 23953. Minnesota, D. C., U. S. Term No. 802. W. E. Johnson, T. E. Brents, and H. F. Coggeshall, appellants, vs. Edwin Gearlds, L. J. Krammer, Fred E. Brinkman et al. Filed December 4th, 1913. File No. 23953.

In the Supreme Court of the United States

OCTOBER TERM, 1913.

W. E. JOHNSON, T. E. BRENTS, AND H. F. Coggeshall, appellants,
v.
EDWIN GEARLDS, L. J. KRAMMER, FRED E. Brinkman, et al.

No. 802.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

MOTION BY THE UNITED STATES TO ADVANCE.

The Solicitor General, on behalf of the United States, respectfully moves the court to advance the above-entitled cause for argument.

This is a suit in equity brought by 12 licensed saloon keepers of the city of Bemidji, State of Minnesota, against the appellants, special officers of the United States Indian Service. The bill alleged that the defendants had directed the complainants to desist from engaging in the liquor business in Bemidji and had threatened, if the complainants failed to observe this order, to close their

places of business and destroy their stocks of liquor, under color of the authority conferred by article 7 of the treaty of February 22, 1855, with the Chippewa Indians, 10 Stat. 1165, 1169, which provides that the laws of Congress—

> which prohibit the introduction, manufacture, use of, and traffic in, ardent spirits, wines, or other liquors, in the Indian country, shall continue and be in force within the entire boundaries of the country herein ceded to the United States, until otherwise provided by Congress.

It is conceded that Bemidji is within these boundaries.

The bill sought to enjoin the threatened interference with complainants' business and destruction of their property.

The appellants' demurrer to the bill was overruled by the district court, which held that the treaty provision in question was repealed by the acts of February 26, 1857, 11 Stat. 166, and of May 11, 1858, 11 Stat. 285, admitting Minnesota to statehood, particularly by the first section of the latter act, which provides:

> That the State of Minnesota shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever.

A temporary injunction was issued. Appellants thereupon answered, setting up in terms the au-

thority of the treaty, and after hearing the injunction was made permanent.

The appellants bring the case here for a review of the district court's ruling against the validity of the treaty of 1855.

The case plainly involves a matter of general public interest. The greater portion of the Territory of Minnesota north of the forty-sixth parallel of latitude was conveyed to the United States by the treaty of 1855. The counties of the State of Minnesota affected by said treaty contained, in 1910, a total white population of 382,191. (R. 54, 63.) The enforcement of the Federal liquor laws relating to Indian country, and hence the sale of any liquor whatsoever within this territory, depend upon the decision of this case.

Opposing counsel concur in this motion.

JOHN W. DAVIS,
Solicitor General.

FEBRUARY, 1914.

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28

No. 802.

In the Supreme Court of the United States

OCTOBER TERM, 1913.

W. E. JOHNSON, T. E. BRENTS, AND H. F. COGGESHALL, APPELLANTS,

v.

EDWIN GEARLDS, L. J. KRAMMER, FRED E. BRINKMAN, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF FOR THE APPELLANTS.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1914

INDEX.

Page.

CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

W. E. JOHNSON, T. E. BRENTS, AND H. F. Coggeshall, appellants,
v.
EDWIN GEARLDS, L. J. KRAMMER, FRED E. Brinkman, et al.
} No. 802.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF FOR THE APPELLANTS.

STATEMENT OF THE CASE.

This case is here on direct appeal from the United States District Court for Minnesota and from a decree rendered April 20, 1912—upon an amended bill (R., 43–65) and reamended answer (R., 66–72)—whereby appellants, who were special officers of the Indian Bureau of the Interior Department, were enjoined from interfering with the saloons of the several complainants located in the city of Bemidji, Beltrami County, Minn.; and from interfering with

the conduct, in each of said saloons, of a retail liquor business with persons of Indian blood.

The amended bill—really a second amended bill—in substance avers: That each of the twelve complainants was running a saloon and carrying on therein a retail liquor business, at a specific location in Bemidji, under an unexpired retail liquor license, duly issued by the Federal revenue authorities, to cover a period from July 1, 1910, to June 21, 1911, and under further license issued, under authority of the State, by the municipal authorities of said city (R., 43–50). That each complainant had refrained from selling liquor to Indians or persons of Indian blood, and had fully complied with all of the laws, Federal and State, regarding the liquor traffic with Indians or otherwise. That irreparable injury would result to the business of each if the threatened acts of defendants should be done, and complainants join to avoid multiplicity of suits. That Beltrami County has existed since 1897; that Bemidji, its county seat, was organized under a village form of government in 1898, and in its growth since, has developed into a city of substantial buildings, public and private, with five railroads, waterworks, and electric-light plant. It has seven thousand inhabitants, and taxable property assessed at over $1,600,000. That within the territory ceded by the treaty of 1855 (*infra*) there was in 1909 property assessed at over $93,000,000, one hundred smaller towns, and a multitude of farms, and the whole area

is now inhabited solely by white people, save Indian allottees and their children. That the latter for several years past have all been full-fledged citizens of the United States and entitled to all the rights, privileges, and immunities thereof (R., 53). That none of said Indians recognize any tribal relation with each other or with other Indians; that no Indian reservation remains. That all the land has been allotted or ceded to, and sold by the United States, save not exceeding 160 acres in the old White Earth Agency, 600 acres in the old Leech Lake Agency, 80 acres north of Cass Lake, and 200 acres in Bena, on which several acreages are old agency and Indian school buildings, or both. That the White Earth and Leech Lake Agencies are occupied by a superintendent of Indian schools and a disbursing agent, and are more than forty miles distant from Bemidji. That since said allotments Indian agents have had practically no powers or duties save to supervise school affairs and disburse annuities. That Indians rarely visit Bemidji, and then only in small numbers during the berrying season. That no Indians live anywhere within twenty miles outwardly from Bemidji, and the Indian title to all lands within Bemidji has been fully extinguished. That in all of said territory the governing jurisdiction of the State has been complete since 1867, and that since then the State law has made the sale of liquor to persons of Indian blood a felony (R., 51–54); that on February 22, 1855, a tribe

of Indians known as Chippewas, comprising three bands, possessing lands in the then territory of Minnesota, by treaty ceded to the United States all lands claimed by them north of a line near the 46th parallel, save certain scattered reservations. (For article 7 of said treaty, see statutes and treaties, *infra*.) That defendants, claiming to act under authority of this treaty article and sections 2139 and 2140 of the Revised Statutes, and amendments thereto, entered into duly licensed saloons in many towns, including six county seats within said ceded territory, and either destroyed the stock or forced its shipment to a point outside of said ceded territory. And on December 9, 1910, they ordered complainants and 20 other saloon keepers in Bemidji to close their saloons and cease sales of liquor, and ship out their stock; and threaten to and, unless this order be obeyed, will destroy complainants' stock and fixtures, and close and ruin their businesses, and cause their arrest for alleged unlawful introduction and sale of liquor in Indian country. That in the 55 years following the treaty of 1855 no effort was made by State or Federal authorities to prevent the liquor traffic in said ceded territory; and licenses to sell were always granted outside of said reservations; and the United States always accepted specific liquor taxes authorizing the business (R., 55–57). That by a treaty concluded May 7, 1864, and ratified March 20, 1865, in consideration of the further cession to it by said Indians of lands reserved to them in the treaty of 1855, there was set apart as a future home for *part* of said Indians

an area which included all lands in and for several miles around Bemidji. That on April 8, 1867, by treaty between the United States and the *last-named Indians*, they were given a new reservation of thirty-six (36) townships and ceded to the United States all the balance of their lands in Minnesota, including all lands within and near Bemidji, thus re-selling them in 1867, without any restrictions whatever as to the liquor traffic, and because thereof, neither article 7 of the treaty of 1855 nor any liquor statute referred to has been operative as to said lands since 1867 (R., 58–61). That under the act of January 14, 1889 (25 Stat. 742), the President appointed commissioners who made agreements with said Indians to cede all of said seven named reservations and part of the White Earth and Red Lake Reservations, which agreements were approved by the President, and thus operated under said act, to completely extinguish the Indian title to said lands. That save a portion in the Red Lake Reservation all the territory included in the treaty of 1855 has been opened to civilized settlement and become populated by white people who have organized political divisions under State laws, established varied industries and commercial interests, and in 1910 the whole population in said ceded territory numbered over 380,000. That the Government officers admit that in a strip of land between Bemidji and the Red Lake Reservation, about 15 miles wide, liquor may lawfully be sold; and, as a result, for six years past seven

saloons have operated in said strip. And that the Indians residing on the Red Lake Reservation in order to reach Bemidji must cross the strip; and if traveling by rail must pass either two or four saloons in so doing (R., 62–64). The bill waives answer under oath (R.,64).

The answer admits the jurisdictional amount, residence of complainants, and conduct of the licensed retail liquor and saloon business in Bemidji, as alleged. It denies that complainants have at all complied with the Federal Indian liquor-traffic laws, and avers that in violation of said article 7 and said United States Statutes, they introduced liquor into Bemidji, which is an Indian country. It admits that since 1867 the Internal Revenue Bureau has issued receipts for retail liquor business in said territory (R., 66–67). It admits the conditions in the said territory to be as described in the bill so far as growth, railroad construction, white settlement, building, property values, and municipal organization is concerned, and that all lands ceded by the treaty of 1867 have since been public lands of the United States. It further avers that on each, the White Earth and Leech Lake Reservations, set apart by said treaties, an agency is maintained to supervise the affairs of said Indians and pay the annuities, and that there is also a superintendent and special disbursing agent with offices and a number of clerks, as well as Indian schools; that at the White Earth Agency 5,600 Indians are carried on the annuity

rolls, and at Leech Lake 1,750 Indians are so carried; and that a majority of all those Indians reside on lands embraced within said reservations which were reserved by the treaty of 1855. It admits that, *in consequence of* the elevation of these Indians to citizenship, by operation of the general allotment act of 1887, a recital judicially known to this court to be partly incorrect, the tribal relations and government thereof have ceased (R., 67), *except* as they have been necessarily continued by these facts, viz: That in 1908, 1909, and 1910 Congress appropriated from tribal funds to the executive committee of the White Earth Band of Chippewas; that two Indian agents are maintained by the United States among these Indians, one at the White Earth Agency and one at the Leech Lake Agency; and their duties and powers are prescribed by chapter 1, title 28, Revised Statutes, and the Regulations of the Indian Office of 1904; that the United States also maintains, for the education and civilization of these Indians, three boarding schools on the Leech Lake Reservation, nine boarding schools on the White Earth Reservation, with a total average daily attendance of 459 pupils; and that the Leech Lake agent and all of the schools are maintained from funds created by section 7 of the act of January 14, 1889 (25 Stat. 645); that all of these instrumentalities for civilization are maintained by the United States in the discharge of its duties toward these Indian wards; and that the White Earth agent is paid from the appropriation

for the support of the "Chippewas of the Mississippi" under the act of March 3, 1911 (36 Stat. 276). That no moneys are now paid said Indians under any provision of the treaty of 1855, but are paid under subsequent treaties and acts of Congress. (R., 68.)

For the purposes of this suit the answer admits that the Indians residing on and occupying the land ceded in 1855, including the White Earth and Leech Lake Reservations, are, generally speaking, either allottees under the general act of 1887 or the act of January 14, 1889, or descendants of such allottees; and that said reservations are principally allotted to Indians, and a large part of the White Earth Reservation is now owned in fee by white men and Indians, and, as to its lands, conditions are substantially as set forth in the bill (R., 68–69).

That all of said Indians are either those, or the descendants of those, who were parties to the treaty of 1855 and the later treaties aforesaid; and that the condition in the 15-mile strip is as set forth in the bill. It avers that in hunting, trapping, and for business and pleasure, said Indians traverse parts of the region comprised in the treaty of 1855 and thus visit the towns and cities therein, including Bemidji, where intoxicating liquors are sold at retail under State statutes, which laws also make sales to persons of Indian blood a crime; and that none of the treaties of cession or acts of Congress since 1855 have at all modified article 7 of that treaty or any of the acts of Congress prohibiting the introduction of

liquor into the ceded territory. It admits the failure to enforce article 7 between 1867 and January 17, 1909, save it avers that in 1905 one Hugh Funk was prosecuted for a violation of said article and statutes in introducing liquor into Ball Club village within said ceded area (R., 69–70); that defendant Johnson, as chief special officer of the United States Indian Service, on September 17, 1909, issued an order that said article 7 would be enforced in all of Cass County north of township 138 north, and warned all liquor dealers to close and remove their stocks before October 17, 1909; that on November 29, 1909, he issued a like order and warning as to all of Becker and Hubbard Counties and parts of Itasca, Norman, Polk, and Clearwater Counties, and on January 15, 1910, he published a list of railway stations within said ceded area in which the United States was endeavoring to enforce said article 7; and on April 8, 1910, he gave notice that article 7 would be enforced throughout all of Becker, Hubbard, and Mahnomen Counties, and parts of Beltrami, Cass, Crow Wing, Ottertail, Wade[illegible], Clearwater, Itasca, and Norman Counties; and that all these orders and acts, including those referred to in the bill, were by direction of the Commissioner of Indian Affairs; and that in the enforcement of these orders, 275 saloons had been closed and 6 saloon keepers indicted and 1,300 gallons of whisky destroyed. The answer further admits that all things required to be done by either the United States or its President or the

various bands of Indians concerned under the acts of January 14, 1889, or April 28, 1904, to make such acts operative, were done; and that the Indian title to all lands mentioned therein became completely extinct except that some of the allotments are still being held for the benefit of some of the Indians. It avers that everything defendants did was done in the line of official duty as special officers of the United States for the suppression of liquor traffic among Indians; that they have no purpose to do more or less than their duty; and that Bemidji is within the Indian country, within the operation of the treaty of 1855 and the laws of the United States (R., 70–71).

The parties then filed a written stipulation that the cause be set down for hearing on said reamended bill and answer "without further pleadings or proceedings and a decree be rendered on said bill and answer." On April 20, 1912, decree was rendered, to which the defendants duly excepted (R., 72–73).

TREATIES AND STATUTES.

On February 22, 1855 (10 Stat. 1165), the Chippewas of the Mississippi, the Pillager Chippewas, and the Lake Winnibigoshish Chippewas jointly executed a treaty with the United States (the Mississippi Chippewas executing it by their separate representatives), whereby they jointly ceded from the general "Chippewa country as established by the treaty of July 29, 1837," an area described by natural boundaries and

within the then Territory of Minnesota, and further ceded all lands then claimed by them. Out of this area thus jointly ceded there was reserved in severalty certain scattered tracts for the Mississippi Chippewas as well as three separate tracts for the Pillager and Lake Winnibigoshish Bands. Article 7 of this treaty provided:

> The laws which have been or may be enacted by Congress regulating trade and intercourse with the Indian tribes to continue and be in force within and upon the several reservations provided for herein, and those portions of said laws which prohibit the introduction, manufacture, use of, and traffic in ardent spirits, wines, or other liquors in the Indian country shall continue to be in force, within the entire boundaries of the country herein ceded to the United States until otherwise provided by Congress.

Annuities provided by the treaty were payable for twenty years thereafter, viz, until 1875, and were so paid.

On February 25, 1857 (11 Stat. 166), Congress passed an enabling act to authorize the framing of a constitution and the taking of "all necessary steps for the establishment of a State government in conformity with the Federal Constitution, to the end that Minnesota might be admitted as a State" on an equal footing with the original States. And on May 11, 1858 (11 Stat. 285), an act was passed which, after reciting the steps taken under the first-named act,

including the furnishing of a State constitution, admitted Minnesota into the Union "on an equal footing with the original States in all respects whatever."

On March 11, 1863 (12 Stat. 1249), the same tribes who were parties to the treaty of 1855 ceded to the United States the several scattered tracts which had been reserved in the first-named treaty in severalty for the Chippewas of the Mississippi; and a new separate reservation was therein set apart for the Chippewas of the Mississippi, which new reservation was a part of the lands originally ceded to the United States in 1855. This treaty, as well as the appropriation acts of Congress and Executive orders of November 4, 1873, and May 26, 1874 (Ex. Ord. Ind. Res. 86–88), recognized the then existence of the treaty of 1855.

On May 7, 1864 (13 Stat. 693), a treaty was executed between the same three tribes and the Government, which virtually replaced the treaty of 1863. It ceded to the United States the same scattered tracts that were ceded in the treaty of 1863, and reserved in turn as a home for the Mississippi Band an area slightly different in boundary from that reserved in the treaty of 1863. The land so set apart for the Mississippi Band is alleged in the bill and admitted in the answer to include the city of Bemidji, and was a part of the land originally ceded to the United States in the treaty of 1855. This treaty was not ratified till 1865, and will be referred to hereinafter as the treaty of that date.

On March 19, 1867 (16 Stat. 719), the Mississippi Band of the Chippewas, *acting alone* and by treaty, ceded all (save a smaller portion still reserved) of the lands reserved to them by the treaty of 1865; and this re-ceded portion includes the land on which Bemidji is located. By article 4 the existence of the treaty of 1855 was recognized. For the convenience of the court a map is appended to this brief showing the various tracts ceded by the above treaties, as well as the several Indian reservations, within and adjacent to the territory covered by article 7 of the treaty of 1855.

Each of these treaties was regularly recommended by the Senate for approval, and approved by the President.

On January 14, 1889 (25 Stat. 642), Congress passed "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota," providing for commissioners who should negotiate with all the bands or tribes of the Chippewas in the State, for the complete cession of all their title to all the reservations in the State except the White Earth and Leech Lake Reservations, and to all of the latter not required to fill allotments; with provisions for allotments within these reservations to the Indians on the Leech Lake Reservation and to all other bands upon the White Earth Reservation, all allotments to be made in conformity with the general act of February 8, 1887. Under this act and an act amendatory thereof of April 28, 1904 (33 Stat. 539), an agreement

was made with these Indians on July 29, 1889 (H. R. Ex. Doc. No. 246, 51st Cong., 1st sess., 34–36). The history of the allotments under these acts and their effect upon the status of the Indians involved will be detailed at a suitable point in the argument.

ASSIGNMENTS OF ERROR.

I. The court erred in its order granting a temporary injunction as prayed in plaintiffs' bill of complaint.

II. The court erred in adjudging and decreeing that the temporary injunction be made permanent.

III. The court erred in the entry of the final decree in the above-entitled cause.

IV. The court erred in making and entering a decree restraining the defendants and appellants from proceeding in the discharge of their duties as set forth in their answer herein.

V. The court erred in decreeing that the city of Bemidji, mentioned in the complainants' bill of complaint, was not subject to the restrictions provided for in said article 7 of the treaty of 1855.

VI. The court erred in not entering a decree herein dismissing the complainants' bill of complaint.

ARGUMENT.

In support of our argument that the judgment of the circuit court should be reversed we maintain two propositions. First, this court has jurisdiction to hear this direct appeal, and, second, article 7 of the treaty of 1855 was in force at the time of the acts complained of in the bill.

I.

THE JURISDICTION.

THIS COURT HAS JURISDICTION TO HEAR THIS DIRECT APPEAL.

Section 238 of the Judicial Code, under which the appeal is taken, provides:

> Appeals * * * may be taken from the district courts * * * to the Supreme Court in the following cases:
>
> Any case that involves the construction or application of the Constitution of the United States;
>
> In any case in which * * * the validity or construction of any treaty made under its authority is drawn in question.

It should be observed at the outset that this is not an appeal from the order of January 10, 1911, overruling the demurrer and granting a temporary injunction, in support of which the opinion of Judge Willard, of January 13, 1911, was delivered. It is an appeal from the final order of April 20, 1912, by which the temporary injunction was made permanent (R., 73–74). No opinion was delivered upon this order, nor are the grounds upon which it was based anywhere stated. Considering the opinion upon the demurrer, however, in connection with the pleadings as they appeared upon the final submission, it is apparent that at least three questions must then have been presented to the court for decision, viz: (1) Was article 7 of the treaty of 1855 impliedly repealed by

the Minnesota enabling act? (2) Did the power of Congress to regulate commerce with Indian tribes survive the admission of Minnesota to statehood in the absence of an express reservation to this effect? (3) Was article 7 of the treaty of 1855 repealed by the subsequent treaties of 1865 and 1867?

Upon this state of the record this court has jurisdiction to hear the direct appeal on three grounds:

(1) The construction or validity of article 7 of the treaty of 1855 is drawn in question.

(2) The construction or application of the Constitution is involved.

(3) The construction of the treaties of 1865 and 1867 is drawn in question.

(1) In *United States* v. *Wright* (229 U. S. 226), the defendant demurred to an indictment charging him with introducing liquor into the Indian Territory in violation of the act of January 30, 1897 (29 Stat. 506). The demurrer was sustained on the ground that the above act was impliedly repealed by the Oklahoma enabling act, and the Government brought the case here under the Criminal Appeals Act, claiming that the invalidity or construction of the act of 1897 was involved. This court sustained its jurisdiction to hear the appeal in the following language (p. 228):

> The criminal appeals act, March 2, 1907 (chap. 2564, 34 Stat., 1246), provides for a writ of error, to be taken by the United States from the district court direct to this court, from a decision or judgment sustaining a demurrer to an

indictment, "where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded." The present case is clearly within this act, as previously interpreted and applied. (Citing cases.)

As the Criminal Appeals Act requires that the decision be "based on the invalidity or construction of the statute *upon which the indictment is founded,*" it follows that jurisdiction in the *Wright* case must have been sustained on the ground that the construction or invalidity of the act of 1897 was involved. If, therefore, a decision to the effect that one statute impliedly repeals another involves the construction or invalidity of the earlier statute, the same must be true of a decision to the effect that a statute repeals an earlier treaty, since treaties and statutes are equally repealable. (*Ex parte Webb*, 225 U. S. 663; *The Cherokee Tobacco*, 11 Wall. 616). And where the construction or validity of a treaty is drawn in question, the fact that the construction of a statute is also involved does not affect this court's jurisdiction. (*Petit* v. *Walshe*, 194 U. S. 216; *Altman & Co.* v. *United States*, 224 U. S. 583.)

But aside from the *Wright* case, there is no doubt that this is a case in which "the validity of a treaty" is drawn in question within the meaning of section 238. "Validity" is a broader term than "constitutionality," which appears in the same section. Indeed, in the language of this court, "the validity of a statute of the United States * * * is drawn in question when

the *existence* or constitutionality or legality of such law is denied." (*Champion Lumber Co.* v. *Fisher*, 227 U. S. 445, 451.) Moreover, "validity" has a particularly comprehensive meaning as applied to treaties. (*Jones* v. *Walker* (C. C. Va.), 2 Paine 288.) In that case, Mr. Chief Justice Jay, of this court, sitting at circuit, said (pp. 695, 696):

> The twenty-sixth section of the judicial act (1 Stat. 87) recognizes its [the judiciary's] power to determine cases where is drawn into question the validities of treaties. Perhaps it may tend to elucidate the subject if we were to consider "validity" applied to treaties as admitting of two descriptions, viz, "necessary" and "voluntary." By "necessary validity" I mean that which results from the treaty's having been made by persons authorized by, and for purposes consistent with, the Constitution. To this kind of validity all such questions as these relate, viz, Has the treaty been made and ratified by the President, by the advice and consent of three-fourths of the Senators present? *Is it temporary, and has it expired? Is it perpetual?* Had it been dissolved with mutual agreement? *Has it been annulled and declared to be void by the Nation, or by those to whom the Nation has committed that power?* Does it contain articles repugnant to the Constitution? Are those articles void? Do they vitiate the whole treaty?

If, therefore, the expression "validity of a treaty" is equivalent to existence of a treaty, the present case is within section 238, inasmuch as it concededly

involves the question whether article 7 of the treaty of 1855 is still in existence or has been repealed.

(2) The enabling act did not expressly repeal article 7 of the treaty of 1855; in fact, it contained no reference to Indians whatsoever, and the question below, therefore, was one of implied repeal, the determination of which involved not only a construction of the treaty and the act, but also a consideration of the respective spheres of Federal and State regulation. The power of Congress in the premises is derived from the commerce clause of the Constitution, which grants to that body power to regulate commerce among the Indian tribes; that of the State is derived from the inherent right in all sovereignties to enact police regulations within their borders. In the absence of an express reservation in favor of Congress in the enabling act the question was which power should prevail in the resulting conflict, or, in other words, is the power of Congress broad enough to survive the creation of a State out of territory in which Indians are situated? The construction of the Constitution was thus involved within the meaning of section 238.

In *United States* v. *43 Gallons of Whisky* (93 U. S. 188), *Dick.* v. *United States* (208 U. S. 340), and *Perrin* v. *United States* (232 U. S. 478), treaty provisions similar to that under consideration were upheld. These provisions, like that in the case at bar, were adopted to preserve the application of the Federal liquor laws to lands which were about

to lose their character as Indian country by reason of the extinguishment of the Indian title thereto. The only distinction between those cases and this one is that in the former the treaties were made *after* the Territories in which the ceded lands were situated had been admitted to statehood, while in the present case the treaty came *before* the enabling act. But if Congress can retain control over ceded lands which are *already* within the boundaries of a State, *a fortiori* can it do so *before* such lands become part of a State, when its power in the premises is derived not only from the commerce clause but also from that provision of the Constitution which gives to Congress power over Territories and other property of the United States. The only effect of a subsequent enabling act is to remove the second ground from the power derived, leaving it dependent upon the commerce clause alone, which is precisely the situation when the treaty comes *after* statehood. The *Whisky*, *Dick* and *Perrin* cases, *supra*, are therefore indistinguishable on this point from the case at bar, and if they involved a construction of the Constitution the same must be true of the present case.

In the *Perrin* case, *supra*, the nature of the question involved was essentially constitutional, as appears from the following passage from the opinion (p. 483):

> Whether this power to protect the Government's Indian wards against the evils of intemperance, of which they are easy victims, is sufficiently comprehensive to enable Congress, when securing the cession of part of an Indian

> reservation within a State, to prohibit the sale of intoxicants upon the ceded lands, if in its judgment that is reasonably essential to the protection of the Indians residing upon the unceded lands, is the real question presented by the first of the defendant's objections. We say it is the real question, because if Congress possesses power to do this it follows that the *State possesses no exclusive control* over the subject and that the congressional prohibition is supreme.

And in the same case the *Whisky* and *Dick* cases were thus reviewed by the court (pp. 483–485):

> The case of *United States* v. *Forty-three gallons of Whisky* (93 U. S. 188), arose out of a treaty with the Chippewas in 1863 (13 Stat. 668), wherein a considerable portion of the reservation in the State of Minnesota was ceded to the United States. The treaty contained a stipulation that the laws of the United States, then in force or thereafter enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country should be operative throughout the ceded lands until Congress or the President should direct otherwise, and the principal question in the case was whether this stipulation *encroached upon the power of the State and upon its equal footing with the original States.* This court upheld the stipulation, and in the course of the opinion * * *, said:
>
> This stipulation was not only reasonable in itself, but was justly due from a strong Government to a weak people it had engaged to pro-

tect. * * * Based as it is exclusively on the Federal authority over the *subject matter* there is no disturbance of the principle of State equality.

The case of *Dick* v. *United States* (208 U. S. 340) is even more in point. There the Nez Perce tribe, by an agreement ratified by Congress, had ceded to the United States a large portion of their reservation in the State of Idaho, and in the agreement was a stipulation subjecting the ceded lands, for a period of 25 years, to the Federal laws prohibiting the introduction of intoxicants into the Indian country. The major part of the unceded lands was allotted in severalty to members of the tribe under the acts of 1887 and 1891, *supra*, and the ceded lands were opened to disposition under the public-land laws. In regular course some of the ceded lands were patented to white men and came to be the site of a town. Under the stipulation Dick was prosecuted for introducing intoxicating liquors into the town, and was convicted; whereupon he brought the judgment here for review, his chief contention being that in view of *Idaho's position as a State* Congress *was without constitutional power* to authorize or ratify the stipulation. Upon full consideration this court affirmed the judgment, and, following *United States* v. *Forty-three Gallons of Whisky, supra*, and other cases, held that the stipulation was a valid regulation and not subject to objection on constitutional grounds.

An examination of the opinion of the court below on the demurrer discloses that although the decision was expressed in terms of an implied repeal, the real ground upon which is was based was that the power of Congress over Indians is not sufficiently broad to extend to ceded Indian lands within a State. It was held that the enabling act repealed the treaty of 1855, not on account of any particular provision therein, but simply because it created a sovereign State whose police power was supreme over all lands within its borders. This is made clear from the following passage in the opinion (R., 38, 41):

> The question is, Where is the power to regulate? Does the United States Government have the power to regulate the sale of intoxicating liquors in this district, or does the State of Minnesota have that power? It was said *In the matter of Heff* (197 U. S. 488) that there could be no divided authority. If the United States Government has the power to regulate it, that power must come in conflict with the power of the State to regulate it.
>
> I can come to only one conclusion in the case, and that is that the provision in article 7 of the treaty of 1855, which prohibited the introduction of intoxicating liquors into the ceded country, was repealed by the act admitting Minnesota into the Union.

In other words, it was held that the admission of Minnesota to statehood created a conflict between Federal and State police powers, and that the latter prevailed because there was no provision otherwise in the enabling act. This was nothing more or less

than a construction of the *commerce clause* adversely to the contention of the appellants.

The present case, therefore, is one involving the construction or application of the Constitution in which a direct appeal lies to this court under section 238.

(3) It may not be denied that the question whether the treaties of 1865 and 1867 repealed article 7 of the treaty of 1855 involves the construction of a treaty. This question, however, was not decided by the court in its opinion upon the demurrer (R., 41), and it will undoubtedly be argued that for this reason the present appeal will not lie on this ground. But, as emphasized at the outset, this is *not* an appeal *from the decision on the demurrer;* and there being no written opinion upon the case as finally submitted, it is impossible to assert with any degree of certainty what was *not* decided at that time. Whether the treaty of 1855 was repealed by the later treaties would necessarily have been passed on next, if the decision as to the effect of the enabling act had been the other way. For aught that appears in the record, the court may have changed its position entirely upon the final hearing, and held that while the enabling act did not repeal the treaty of 1855, the later treaties did. In any event, the fact that the court refused to pass on the question at one stage of the proceedings is certainly not conclusive that it did not do so at another.

But assuming that the question was never passed on, the construction of the later treaties was never-

theless drawn in question within the meaning of section 238. That section, unlike section 237 and the Criminal Appeals Act, does not require a decision on the point by the court below. As long as the question was properly presented by the pleadings so that the lower court *could* have decided it if it had chosen to do so, an appeal will lie under section 238.

Muse v. *Arlington Hotel Co.* (168 U. S. 435).
Cornell v. *Green* (163 U. S. 75).
Holder v. *Aultman* (169 U. S. 81).
Loeb v. *Township* (179 U. S. 472).

The record shows that the treaties of 1865 and 1867 and their alleged effect on the treaty of 1855 were specifically pleaded in the amended bill (R., 57–61), and that issue was taken thereon in the amended answer as follows (R., 69):

> These defendants deny that the several acts of Congress and treaties mentioned in said bill, and which were enacted and promulgated subsequent to said treaty of 1855, repealed or in any wise modified said article 7 of said treaty of 1855, prohibiting the introduction of intoxicating liquor into the territory thereby ceded, and aver that none of said laws and treaties, or any law or treaty enacted by Congress or promulgated by the President of the United States, has repealed, modified, changed, or weakened the force and effect of said article 7 and the laws of the United States prohibiting the introduction of intoxicating liquor into said ceded territory, which these defendants allege is by virtue thereof Indian country.

Under these circumstances, the fact that the court below may not have decided the question does not take the case out of the operation of section 238, for clearly a circuit court can not oust this court of its appellate jurisdiction by deciding (and in this instance erroneously deciding) but one of the questions which were properly presented to it by the pleadings.

II.

THE MERITS.

ARTICLE 7 OF THE TREATY OF 1855 WAS IN FORCE AT THE TIME OF THE ACTS COMPLAINED OF IN THE BILL.

No claim is made that article 7 of the treaty of 1855 was beyond the constitutional limits of the treaty-making power at the time it was made; nor that it does not cover the *locus in quo* in the present case. What is contended is, that the article is no longer in force, and was not in force at the time the acts complained of are alleged to have been committed; and no less than three causes are assigned as having done away with it. We maintain that none of these causes has had the effect contended for.

(1) Article 7 of the treaty of 1855 was not repealed by the Minnesota enabling act, nor by the act admitting that State into the Union.

Two years after the treaty of 1855 was ratified Congress passed the Minnesota enabling act (11 Stat. 166). It contained no reference whatever to Indians, nor to the previous treaty, and it is argued that

from these omissions an intention to repeal article 7 may be implied. But as will be pointed out *infra*, it was not necessary for Congress to expressly declare in the enabling act that the article should continue in force after statehood; and when it is remembered that the need for the prohibition must have been fully as great in 1857 as in 1855, it is impossible to attribute to Congress any such rapid change of policy. Certainly it is fair to suppose that if such a change had been intended it would have been expressed in more certain terms. Moreover, the decisions of this court in *Ex parte Webb, supra*, and *United States* v. *Wright, supra*, handed down during the pendency of this appeal, leave no room for doubt on the subject. It is true that the Oklahoma enabling act, which was involved in thoses cases, contained a provision that nothing in the State constitution should be construed to limit or impair the rights of person or property of the Indians of the Indian Territory or to limit the authority of the United States to make any law respecting such Indians which it would have been competent to make if the act had never been passed; but on the other hand, it also provided that the constitution of the proposed State should prohibit the introduction, etc., of liquor into the Indian Territory, and, in spite of this broad delegation of authority to the future State, it was held in the *Webb* case that the enabling act did not repeal the act of 1895 in so far as it forbids the interstate introduction of liquor into the Indian Territory, and in the *Wright* case that

it did not repeal the act of 1897, which forbids *any* introduction of liquor into the Indian country as such. Certainly, as regards the latter act, there was at least an apparent inconsistency between its continued existence and the provision in the enabling act authorizing the State to deal with the introduction of liquor into the Indian Territory; yet it was held in the *Wright* case that the duty of the Federal Government to protect the Indians from the use of intoxicants is so strong that an intention to entirely delegate that duty to a State can not be implied in the absence of unequivocal language. Or as it was put by the court in that case (p. 238):

> The liquor prohibition, so far as it concerns the Indians, has always been deemed one of the peculiar responsibilities of the Government at Washington, and it may easily be believed that Congress felt reluctant to delegate the subject matter wholly to the State government that was about to be established in the Indian Territory; especially as the same subject matter in other States remained, as it still remains, under Federal control.

Here there is no inconsistency whatever between the provisions of article 7 and the enabling act, and certainly it can not be maintained in the face of these two cases that the mere omission in the later act to refer to an existing treaty prohibiting the liquor traffic with the Indians is a sufficient reason for holding that it has been repealed.

By the act of May 11, 1858 (11 Stat. 285), Minnesota was admitted to the Union "on an equal footing

with the original States in all respects whatever." The real ground of the decision below on the demurrer seems to have been that the admission of Minnesota to equal statehood was in itself inconsistent with the continued existence of article 7, the theory being that the condition of statehood carries with it supreme police power over the entire State, to the exclusion of any Federal power within the same limits.

The fallacy of this position lies in its failure to grasp the fundamental principle that the regulation of commerce with Indian tribes, as well as that with foreign nations and between the several States, is a subject of exclusive Federal control, and that the States, at least when Congress has acted, have no power whatever over such subjects. By applying this principle of exclusive control over the subject matter, it has been frequently held that Congress may by treaty or statute forbid the introduction of liquor into ceded Indian lands which are within the jurisdiction of a previously created State. (*Perrin* v. *United States, supra; Dick* v. *United States, supra; United States* v. *43 Gallons of Whisky, supra.*) The only distinction between these cases and the present one is that in the former the cession and prohibition came after statehood, while in the latter they came before; and it was on this ground that the *Dick* and *Whisky* cases were regarded as not controlling by the court below. But this is a distinction without a difference. For if a prohibition is valid when made *after* statehood, it must be because such a prohibition is not incon-

sistent with the condition of statehood; and it follows irresistibly that the elevation to statehood of a Territory to which the prohibition originally applied is not at all inconsistent with the continued existence of that prohibition. The fact that the Territory becomes a State does not create any divided authority or conflict of authority over Indian matters between the Federal and State Governments, because the subject is one of *exclusive* congressional control regardless of its location. The only difference is that when the Indians are situated in a Territory the power of Congress over them is derived from that provision of the Constitution granting to the Federal Government control over its Territories and other property (sec. 3, Art. IV), *as well as* from the commerce clause; while after the Territory has become a State the power is dependent upon the latter clause alone. But this is of course ample. The admission of Minnesota to the Union no more repealed article 7 of the treaty of 1855 than the admission of Arizona and New Mexico repealed the Interstate Commerce Act in so far as it applies to territory wholly within their boundaries.

We do not contend of course that the enabling act of a State *may* not expressly or even impliedly repeal previous treaties or statutes relating to Indians. The point is that the mere creation of a State does not in and of itself do so. This was recognized in the two recent cases of *Ex parte Webb*, *supra*, and *United States* v. *Wright*, *supra*, wherein it was held that the admission of Oklahoma did not repeal the acts of 1895 and 1897, both of which prohibit the liquor

traffic with Indians. The *Webb* case contains the following significant passage (p. 683):

> The reservation of the authority of Congress to legislate in the future respecting the Indians residing within the new State is clearly supportable under the Federal Constitution (Art. I, sec. 8), which confers upon Congress the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." It has been repeatedly held by this court that under this clause traffic or intercourse with an Indian tribe or with a member of such a tribe is subject to the regulation of Congress, although it be within the limits of a State. (*United States* v. *Holliday*, 3 Wall. 407, 418; *United States* v. *43 Gallons of Whisky*, 93 U. S. 188, 195, 197; *Dick* v. *United States*, 208 U. S. 340, and cases cited.)
>
> And it is as clearly consistent with the Constitution to maintain in force an existing act of Congress relating to such traffic and intercourse, so that it shall continue effective within the limits of the new State, as it is to reserve the right to enact new laws in the future upon the same subject matter.

See also *Donnelly* v. *United States* (228 U. S. 243); *United States* v. *Pelican* (232 U. S. 442).

Considerable emphasis was laid by the court below on the absence of any reservation of article 7 in the Minnesota enabling act. But such a reservation would have made no difference whatever from a constitutional standpoint. If Congress has not power over the subject matter, it may not acquire such

power by a reservation in the enabling act of a State; and, on the other hand, if power over the subject matter is possessed, it need not be preserved by express reservation. In other words, Congress can not reserve to itself any powers within a new State which it could not exercise within the limits of that State after its admission into the Union. This is made clear from the case of *Coyle* v. *Oklahoma* (221 U. S. 559), in which it was held that the Oklahoma enabling act (34 Stat. 267), in providing that the capital of the State should remain at Guthrie until the year 1913, ceased to be a limitation upon the power of the State after its admission. After reviewing and approving the case of *Pollard* v. *Hagan* (3 How. 212), the court said (p. 573):

> The plain deduction from this case is that when a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new State came into the Union *which would not be valid and effectual if the subject of congressional legislation after admission.*

Hence inasmuch as Congress could not have fixed the situs of the capital of Oklahoma after its admission to statehood, it was equally powerless to do so by a reservation in its enabling act. But the court was careful to point out the converse of the proposition (p. 574):

> It may well happen that Congress should embrace in an enactment introducing a new State into the Union legislation intended as a regulation of commerce among the States, *or with Indian tribes situated within the limits of such new State*, or legislation touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new State, nor by reason of its acceptance of such enactment as a term of admission, *but solely because the power of Congress extended to the subject*, and, therefore, would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress.

To like effect are *Ex parte Webb*, *supra*, and *United States* v. *Sandoval* (231 U. S. 28), in the latter of which it was said (pp. 36–38):

> The indictment is founded upon the act of January 30, 1897 (29 Stat. 506, c. 109), as supplemented by section 2 of the act of June 20, 1910 (36 Stat. 557, c. 310), being the New Mexico enabling act. The first act makes it a punishable offense to introduce intoxicating liquor into the Indian country, and the second, in naming the conditions upon which New Mexico should be admitted into the Union, prescribed, in substance, that the lands then owned or occupied by the Pueblo Indians should be deemed and treated as Indian

country within the meaning of the first act and kindred legislation by Congress.

Whether without this legislative interpretation the first act would have included the pueblo lands we need not consider. The Territorial Supreme Court had but recently held that it did not include them (*United States* v. *Mares*, 14 N. M. 1), and Congress, evidently wishing to make sure of a different result in the future, expressly declared that it should include them. *That this was done in the enabling act and that the State was required to, and did, assent to it, as a condition to admission into the Union, in no wise affects the force of the congressional declaration, if only the subject be within the regulating power of Congress.*

The opinion below on the demurrer seems also to have been based on the ground that the continued application of article 7 to the ceded lands after the admission of Minnesota into the Union would result in a curtailment of that State's police powers within its own boundaries contrary to the doctrine of equality of statehood. Here again the principle of Federal control is lost sight of. The obvious answer is that *none* of the States possess any police power over commerce with the Indians, because that power is vested by the Constitution exclusively in Congress. Hence to deny the power to Minnesota was the rule and not the exception, and indeed had the power been granted to her, inequality would have been the result. The following quotation from the *Whisky* case, *supra*, in which a

treaty provision substantially identical to article 7 was upheld, is conclusive on this point (p. 197):

> It is not easy to see how it infringes upon the position of equality which Minnesota holds with the other States. The principle that Federal jurisdiction must be everywhere the same, under the same circumstances, has not been departed from. The prohibition rests on grounds which, so far from making a distinction between the States, apply to them all alike. The fact that the ceded territory is within the limits of Minnesota is a mere incident, for the act of Congress imported into the treaty applies alike to all Indian tribes occupying a particular country, whether within or without State lines. Based as it is exclusively on the Federal authority over the *subject matter*, there is no disturbance of the principle of State equality. (Italics are the court's.)

And to the same effect are the *Dick* and *Webb* cases, *supra*.

None of the cases relied on by the court below are controlling. In *United States* v. *McBratney* (104 U. S. 621) and *Draper* v. *United States* (164 U. S. 240) the question was whether the circuit courts had jurisdiction over a murder committed within the limits of an Indian reservation lying within a State, neither the defendant nor the deceased being Indians. In both cases the reservations involved were created prior to the admission of the Territories in which they were situated to statehood, and in the enabling

acts of these Territories there was no provision that Federal jurisdiction should continue to extend to these reservations. It was held that the State courts had exclusive jurisdiction over the crimes involved, even though committed on Indian reservations, since those reservations were within the boundaries of a State and therefore subject to its general police power *as long as no Indians were involved.* To have held otherwise would have been to deprive the States involved of the right to punish offenses committed by their own citizens within the territorial limits of their jurisdictions—a right inherent in every sovereign body—and inequality of statehood would have been the inevitable result. (*Draper* v. *United States*, *supra*, 247.) In these cases there was no Federal authority over the subject matter, the bare fact that the crime occurred on a reservation being insufficient since the reservation was not reserved as Federal jurisdiction in the enabling acts. In the present case, however, Federal authority over the subject matter (at least at the date of the admission of Minnesota into the Union) was complete, since there were Indian tribes within the ceded lands and the subject of the regulation was commerce. (*United States* v. *Holliday*, 3 Wall., 407, 416, 417.)

That the *McBratney* and *Draper* cases were based on the ground that they involved nothing over which the Federal Government has jurisdiction has been recently pointed out by this court in *Donnelly* v. *United States* (228 U. S. 243), wherein it was held that a circuit court has jurisdiction of a crime com-

mitted by a white man *against an Indian* on an Indian reservation. The court said (p. 271):

> Reference is made to the cases of *United States* v. *McBratney* (104 U. S. 621) and *Draper* v. *United States* (164 U. S. 240), where it was held, in effect, that the organization and admission of States qualified the former Federal jurisdiction over Indian country included therein by withdrawing from the United States and conferring upon the States the control of offenses committed by white people against whites, *in the absence of some law or treaty to the contrary*. In both cases, however, the question was reserved as to the effect of the admission of the State into the Union upon the Federal jurisdiction over crimes committed by or against the Indians themselves. (104 U. S. 624; 164 U. S. 247.) Upon full consideration we are satisfied that offenses committed by or against Indians are not within the principle of the *McBratney* and *Draper* cases. This was in effect held, as to crimes committed by the Indians in the *Kagama* case (118 U. S. 375, 383), where the constitutionality of the second branch of section 9 of the act of March 3, 1885 (23 Stat. 385), was sustained upon the ground that the Indian tribes are the wards of the nation. This same reason applies—perhaps *a fortiori*—with respect to crimes committed by white men against the persons or property of the Indian tribes while occupying reservations set apart for the very purpose of segregating them from the whites and others not of Indian blood.

And in *United States* v. *Sutton* [1] (215 U. S., 291), these two cases were thus distinguished from cases like the present one (p. 295):

> The offense charged was not one committed by a white man upon a white man, *United States* v. *McBratney* (104 U. S., 621; *Draper* v. *United States*, 164 U. S., 240), or by an Indian upon an Indian (*United States* v. *Celestine*, *ante*), but it was the introduction of liquor into an Indian reservation. In this offense neither race nor color are significant. The Indians, as wards of the Government, are the beneficiaries, but for their protection the prohibition is against all, white man and Indian alike.

Ward v. *Race Horse* (163 U. S. 504), which was regarded by the court below as controlling (R., 38), is another case where the Federal Government attempted to act where it had no authority over the subject matter. There it was provided by a treaty made in 1869 that the Bannock Indians should have the right to hunt upon the unoccupied lands of the United States, so long as game should be found thereon and peace subsist between the whites and the Indians. In 1890, Wyoming, the State in which these Indians were situated, was admitted to the Union (26 Stat. 22) by an act which contained no exception or reservation in favor of or for the benefit of the Indians, and subsequently the State legislature passed an act regulating the killing of game within

[1] This case was the latest decision of this court which was brought to the attention of the lower court, as appears from the opinion on the demurrer (R., 26).

the State. The petitioner (a Bannock Indian) was indicted for violating the provisions of this act, and sued out a writ of habeas corpus on the ground that the treaty deprived the State courts of jurisdiction over this offense. It was held that the admission of Wyoming to statehood carried with it the exclusive right to regulate the killing of game within its borders, which right was inconsistent with and necessarily repealed the provision of the treaty relied on, for otherwise inequality of statehood would result.

Here again there was no Federal control of the subject matter. Congress clearly could not have enacted, *after* Wyoming had become a State, that the Bannock Indians should have the right to hunt upon the unoccupied lands of the United States therein; and under the doctrine of *Coyle* v. *Oklahoma, supra,* what Congress can not do after statehood it can not do before statehood, so as to bind a State after its admission into the Union. On the other hand, Congress *could* have enacted article 7 *after* the admission of Minnesota to statehood (*United States* v. *43 Gallons of Whisky*), and could therefore do so *before* its admission (*United States* v. *Sandoval, supra*). *Ward* v. *Race Horse, supra,* is thus easily distinguishable from the case at bar.

In *Coyle* v. *Oklahoma, supra,* the *Race Horse* case was regarded by this court as one in which there was no Federal power over the subject matter. It was thus stated by the court (p. 576):

> In *Ward* v. *Race Horse, supra,* the necessary equality of the new State with the original

States is asserted and maintained against the claim that the police power of the State of Wyoming over its wild game had been restricted by an Indian treaty made prior to the admission of the State of Wyoming.

The case of *Friedman* v. *U. S. Express Company* (D. C. Ark.; 180 Fed. 1006), also relied on by the court below, was overruled by the Circuit Court of Appeals for the Eighth Circuit in *U. S. Express Co.* v. *Friedman* (191 Fed. 673). It was there held that the Oklahoma enabling act did not repeal the operation of the act of January 30, 1897 (29 Stat. 506), within that State. See also *Mosier* v. *United States* (C. C. A. 8th C., 198 Fed. 54); *Ex Parte Webb, supra; United States* v. *Wright, supra.*

(2) Article 7 of the treaty of 1855 was not repealed by the treaties of 1865 and 1867.

The pertinent facts as well as the provisions of the various treaties involved have already been set forth. To simplify the argument, however, they may be recapitulated in the following more general terms: By the treaty of 1855, the Indians ceded a tract of land (which is designated on the appended map as the "A" tract) to the United States, the latter agreeing in Article 7 of the said treaty that the laws forbidding the introduction, manufacture, etc., of liquor in the Indian country should continue to be in force "within the entire boundaries of the country herein ceded to the United States, until otherwise provided by Congress." By the treaty of 1865, the Indians ceded to the United States certain scattered

tracts of land, which, by the treaty of 1855, had been reserved as a home separately for the Mississippi Band, and which are designated on the map as the "B" tracts. There was also reserved by this treaty as a home for the Mississippi Band *separately* another portion of the "A" tract (which is designated as the "C" tract), in which the town of Bemidji (the *locus in quo* in the present case) is now situated. By the treaty of 1867, the Mississippi Band *acting alone* re-ceded the "C" tract to the United States. In neither of the last two treaties was there any reference to article 7 of the treaty of 1855, nor to the subject matter of intoxicating liquors, and the question thus presented is whether article 7 continued to apply to tract "C" after the treaties of 1865 and 1867.

Little need be said in answer to the argument that the later treaties repealed article 7 of the earlier treaty in the generally accepted sense in which that word is used. There is nothing in the later treaties which is at all inconsistent with the prohibition; in fact they contain no reference whatever to the subject of intoxicating liquors. But it is said that this very omission is indicative of an intention on the part of the treaty-making power to cede tract "C" without restriction, and that when the Indian title thereto was extinguished by the recession under the treaty of 1867 there was nothing to preserve the application of the liquor laws. The obvious answer is that tract "C," being part of tract "A," was already protected by the ample provisions of article 7,

and hence it would have been the merest redundancy to repeat those provisions in the treaty of 1867.

No reason can be assigned why the treaty-making power should have wished to do away with article 7 as to tract "C." At that time the need for protection was as urgent there as at other points in tract "A," as to which there could be no repeal by the later treaties. Nor is it any answer to say that the State prohibition laws would have been sufficient protection to the Indians in tract "C," for the Federal Government has more than once refused to accept State protection for its wards as a substitute for its own. *United States* v. *Wright, supra*. In short, therefore, the argument for the implied repeal finds no more support in the policy of the Government toward the Indians than in the language of the treaties themselves.

But even if there be no basis for an implied repeal in the ordinary sense of the word, it is argued that when tract "C" was reconveyed (as is claimed) to the original grantors by the treaty of 1865, it was taken out of the operation of article 7, and that since that article was not *reenacted* in *the treaty of 1867*, which re-ceded tract "C" to the United States, there was no longer any prohibition applicable to that tract. This argument is apparently based upon the rule that a reconveyance to the original grantor of land to which a covenant relates has the effect of extinguishing the covenant. (*Silverman* v. *Loomis*, 104 Ill. 142; *Green* v. *Edwards*, 15 Tex. Civ. App. 382.) Conceding the soundness of this rule, there

are two reasons why it is inapplicable to the case at bar. First, the reconveyance of the "C" tract was not to the original grantors under the treaty of 1855, namely, the Mississippi, Pillager, and Lake Winnibigoshish Bands, *but to only one of them*, viz, the Mississippi Band;[1] and, second, even if the reconveyance may be regarded as to the original grantors, it is not to be supposed that the operation of treaties is governed by any such technical rule of property. (*Wilson* v. *Shaw*, 204 U. S. 24, 33.) A treaty is something more than a mere covenant; it is a contract between sovereign nations and by the Constitution is declared to be the supreme law of the land. Especially is this so of a provision like article 7, which is self-executing (*United States* v. *43 Gallons of Whisky*, *supra*, 196), and therefore equivalent to an act of Congress. (*Foster* v. *Neilson*, 2 Pet. 314.) If Congress had specifically provided that tract "A" should be Indian country in spite of its original cession and the consequent extinguishment of the Indian title thereto, no one would contend that the reconveyance of a part of that tract (tract "C"), or even the whole of it, to the Indians, would have any effect on the operation of the statute. As long as such a statute remained in force the land to which it related would obviously remain Indian

[1] The Indians who were parties to the treaty of 1855 are erroneously referred to in the bill as a *single tribe* of three bands, constituting all of the Chippewas. In reality (as this court judicially knows) there were Michigan, Lake Huron, Pembina, and Red Lake Chippewas, besides those executing the treaty of 1855, viz, the Mississippi, Pillager, and Lake Winnibigoshish Bands. Indeed it was the Red Lake and Pembina Chippewas who executed the treaty of 1863 (13 Stat. 668) involved in the *whisky* case, *supra*.

country regardless of who became its owner, and precisely the same thing is true of article 7, which is the equivalent of a statute.

(3) Article 7 of the treaty of 1855 had not expired at the time of the acts complained of in the bill by reason of any change in the character of the territory to which it applies.

We concede, of course, that article 7, though valid in the beginning and in its terms to continue "until otherwise provided by Congress," can not be upheld as a legitimate regulation when the subject matter upon which its validity depends is removed. Thus if there were no Indian wards within the ceded territory at the present time no one would be heard to say that the prohibition could be enforced. But on the other hand the justification for the prohibition rests preeminently with Congress, and if that body has not seen fit to repeal it, it is not to be condemned by the courts unless purely arbitrary. The proposition has been thus stated by this court in the recent case of *Perrin* v. *United States, supra*, in which a prohibition of indefinite duration in all respects similar to article 7 was upheld (p. 486):

> As the power is incident only to the presence of the Indians and their status as wards of the Government, it must be conceded that it does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis. Thus a prohibition like that now before us, if covering an entire State when there

> were only a few Indian wards in a single county, undoubtedly would be condemned as arbitrary, and a prohibition valid in the beginning doubtless would become inoperative when in regular course the Indians affected were *completely* emancipated from Federal guardianship and control. A different view in either case would involve an unjustifiable encroachment upon a power obviously residing in the State. On the other hand, it must also be conceded that, in determining what is reasonably essential to the protection of the Indians, *Congress is invested with a wide discretion*, and its action, unless purely arbitrary, must be accepted and given full effect by the courts.

The question therefore is whether the territory which was ceded by the treaty of 1855 was in 1910 (the date of the acts complained of in the bill) so utterly lacking in Indian subject matter as to justify the condemnation of the prohibition as unreasonable.

The situation appears to have been substantially as follows: The ceded district (designated as tract "A" on the map), covers an area of more than 15,000 square miles. It has a population of 382,191 and includes nearly seven counties. Bemidji, the *locus in quo* in the present case, is a town of some 7,000 inhabitants and contains at least 12 saloons duly licensed under the internal revenue laws of the United States and of the State of Minnesota. The respondents are the respective proprietors of these saloons. On the other hand, the

district embraces two Indian reservations, namely, the White Earth and the Leech Lake, the combined areas of which are approximately 800,000 acres. Upon each of these reservations the Government maintains an Indian agency, an Indian superintendent, and other employees, as well as Indian schools. At the White Earth Agency, 5,600 Indians are carried on the annuity rolls, and at the Leech Lake Agency 1,750 Indians are so carried. Both reservations are in process of allotment under the acts of February 8, 1887 (24 Stat. 388), January 14, 1889 (25 Stat. 642), and April 28, 1904 (33 Stat. 539), all of which provide (the two later acts by reference to the act of 1887) that the title to lands allotted thereunder shall remain in the United States in trust for the various allottees for a period of 25 years. (See Rep. Com. of Ind. Aff. (1912), pp. 101, 102). Under the act of 1887 all allottees became citizens of the United States and the States in which they resided, upon the receipt of trust patents. (*Matter of Heff*, 197 U. S. 488.) By the act of May 8, 1906 (34 Stat. 182), this act was amended by a provision to the effect that citizenship should be postponed till the expiration of the trust period and the issuance of a patent in fee to the allotted lands. This amendment probably applies only to trust patents issued after the date of its passage. By the act of June 21, 1906 (34 Stat. 325, 353), as amended by the act of March 1 1907 (34 Stat. 1015, 1034), commonly known as the "Clapp amendment," all restrictions as to sale and

incumbrance on allotments in the White Earth Reservation made to *mixed bloods* either before or after the passage of the amendment were removed, and all trust patents were given the effect of patents in fee simple. As to full bloods, it was provided (as in the act of May 8, 1906, *supra*) that such restrictions could be removed by the Secretary of the Interior when he became satisfied that any such allottees were competent to handle their own affairs.

Under this state of the law there are three classes of allottees within tract "A," as follows:

> (1) Full blooded White Earth and all Leech Lake holders of trust patents under the acts of 1887, 1889, and 1904, issued prior to the act of May 8, 1906. These allottees are probably citizens of the United States and Minnesota, but can not alienate their lands, the fee being in the United States.
>
> (2) Full blooded White Earth and all Leech Lake holders of trust patents under the acts of 1887, 1889, and 1904, issued after the act of May 8, 1906. These allottees are not citizens of the United States or Minnesota, save such as may have received patents in fee from the Secretary of the Interior as being competent to manage their own affairs.
>
> (3) Mixed blood White Earth allottees under the acts of 1887, 1889, and 1904, irrespective of the time when the patents were issued. These allottees are citizens of the United States and Minnesota and may alienate their lands without restriction. Their number is uncertain and will continue to be

> so until this court judicially defines the meaning of the term "mixed blood" in the Clapp amendment. Three cases requiring such a definition have recently been argued here. (Nos. 873, 874, and 875.)

It thus appears that the first class of allottees may be citizens but not fee simple allottees; the second class are neither; and the third class are both. As to the first class, there can be no doubt that, even if citizens, they must be regarded, for the purposes of this case, as in a condition of wardship and therefore subject to Federal supervision, because the trust period for which their lands were held by the Government could not have expired at the time of the acts complained of in the bill.

> *United States* v. *Pelican, supra.*
> *Matter of Rickert* (188 U. S. 432, 437).
> *McKay* v. *Kalyton* (204 U. S. 458, 466, 468).
> *Couture, Jr.*, v. *United States* (207 U. S. 581).
> *United States* v. *Celestine* (215 U. S. 287, 290, 291).
> *Tiger* v. *Western Investment Co.* (221 U. S. 286).
> *Hallowell* v. *United States* (221 U. S., 312).

In *Perrin* v. *United States, supra,* in which a treaty provision covering territory which had been allotted under the act of 1887 was sustained, it was said pertinently to the question at hand (p. 487):

> The conditions justifying the prohibition remain substantially the same as when it was adopted. *The trust period has not expired,*

the tribal relation has not been dissolved, and the wardship of the Indians has not been terminated.

As to the second class their status as wards can not be doubted, the express purpose of the act of June 21, 1906, having been to postpone their emancipation. See *United States* v. *Celestine, supra*, 291.

As to the third class, their status as emancipated Indians is not concluded by reason of their citizenship or their fee-simple allotments, but necessarily depends upon the further question whether they are recognized as a dependent people by the executive or legislative branches of the Government. (*United States* v. *Sandoval, supra*.) But since their number as wards or otherwise is in any event comparatively small and as yet undetermined, it is sufficient to say that of the 8,281 Indians who had received allotments within tract "A" up to the year 1912 (Rep. Com'r of Ind. Aff. (1912), p. 101, 102), 7,483 were at that time regarded by the Interior Department as under Federal supervision. (Ibid, p. 87.) Approximately this number (7,350) are carried on the annuities rolls of the two reservations.

The remaining question, then, is whether the presence of this number of Indian wards within the boundaries of tract "A" is sufficient to justify the continued existence of a prohibition covering its entire area. True the lands actually occupied by the Indians (800,000 acres) are only a small proportion of the total area of tract "A" (15,000 square miles), but this

court has recognized the necessity of extending such a prohibition to territory adjacent to the actual danger zone, and the wisdom of such legislation, when considered in relation to its purpose, can not be doubted. Thus in *United States* v. *43 Gallons of Whisky, supra,* it was said (p. 195):

> If liquor is injurious to them (the Indians) inside of a reservation, it is equally so outside of it; and why can not Congress forbid its introduction into a place near by, which they would be likely to frequent? It is easy to see that the love of liquor would tempt them to stray beyond their borders to obtain it; and that bad white men, knowing this, would carry on the traffic in adjoining localities rather than venture upon forbidden ground. If Congress has the power, as the case we have last cited decides, to punish the sale of liquor anywhere to an individual member of an Indian tribe, why can not it also subject to forfeiture liquor introduced for an unlawful purpose into territory in proximity to that where the Indians live? There is no reason for the distinction; and, as there can be no divided authority on the subject, our duty to them, our regard for their material and moral well-being, would require us to impose further legislative restrictions should country adjacent to their reservations be used to carry on the liquor traffic with them.

But the Indians actually within tract "A" are by no means the only ones involved. An examination of the appended map discloses that the large Red

Lake Reservation, covering an area of 543,528 acres and containing 1,436 Indians, is situated not more than fifteen miles from tract "A" and not more than thirty miles from Bemidji itself. Every one of these Indians is in a condition of wardship. (Rep. Com'r of Ind. Aff. (1912), p. 87.) About the same distance from tract "A" to the east lies the Fond du Lac Reservation covering an area of approximately 100,000 acres and containing 962 Indians, all of whom are likewise under Federal supervision. (Rep. Com'r of Ind. Aff. (1912), p. 87.) It is true that this reservation lies within tract "E," as to which there is a separate prohibition (Art. 7 of the treaty of September 30, 1854, 10 Stat. 1109); but this would be small protection if tract "A," which is easily accessible, should be opened to the liquor traffic.

It is moreover alleged in the answer that the Indians in hunting, trapping, and for business and pleasure, are wont to visit the various cities and towns within the prohibition area, and among them Bemidji (R., 69) which, as the map so clearly discloses, is flanked on three sides by Indian Reservations. And while this allegation is somewhat inconsistent with the averments of the bill, it must prevail for the purposes of this appeal, since the bill waived an answer under oath (R., 64), and the case was submitted on the pleadings (R., 72). (*Peoples' Bank* v. *Gilson* (C. C. A. 8th C.), 161 Fed. 286, 291.) The bill and answer are likewise in conflict as to the extent to which the Government has sought to prevent the liquor traffic

within tract "A" since its cession in 1855. But it appears from the answer (which prevails here) that some effort has been made in the direction of prohibition since 1905 (R., 69, 70); and this court judicially knows that in the same year Attorney General (afterwards Mr. Justice) Moody held that article 7 was still in force within tract "A." (25 Ops. A. G. 416.) It also judicially knows that in 1911 President Taft recommended to Congress in a special message that the article be amended so as to cover only that part of tract "A" which is adjacent to the White Earth and Leech Lake Reservations (Sen. Doc., 824, 61st Cong., 3d sess.), and that Congress failed to act in accordance with the recommendation, thus plainly indicating that the article was not only alive, but that that body intended that it should continue in its original form and vigor throughout the entire tract. Admitting, however, that the Government has been extremely lax in the matter of enforcement, it by no means follows that article 7 may be regarded as a dead letter, since popular disregard of a law can not work its repeal. (*Georgia Rd., etc., Co.* v. *Walker*, 87 Ga. 204.)

The bill places considerable emphasis upon an alleged admission by certain Government officials that neither the provisions of article 7 nor of any other treaty are in force in a strip of land 15 miles in width lying between the Red Lake Reservation and Bedmidji (R., 63), and seems to contain a suggestion of an estoppel arising therefrom against the

enforcement of the article within tract "A." While this condition of affairs is admitted in the answer (R., 69), this court will take judicial notice that the 15-mile strip referred to is not and has never been covered by any treaty provision, and that it lies entirely outside of the northernmost boundaries of tract "A." Hence the so-called admission of the Government officials that this area is "wet" is of course irrelevant to any question involved in the present case. The appended map clearly discloses the true situation.

Finally the need for protection can not be overemphasized. In 1912 more than 31 per cent of the Indians on the Leech Lake Reservation and more than 17 per cent of those on the White Earth Reservation were estimated as having tuberculosis, while over 19 per cent at Leech Lake and 26 per cent at White Earth were estimated as afflicted with trachoma. (Rep. Com'r of Ind. Aff. (1912), p. 171.) Liquor is destructive enough to Indians in ordinary health, but it is death itself to them when they are already weakened by the ravages of disease. Moreover, the State prohibition laws are inadequate to meet the situation. This clearly appears from the following extract from the latest report (1912) of the Commissioner of Indian Affairs (p. 47):

> The situation in Minnesota, so far as our operations are concerned, changed but little. The condition among the Indians has become worse, and reports indicate that the Indians have but little difficulty in obtaining liquor.

> As about 75 per cent of the Indians in that State are citizens, and operations under the provisions contained in the various treaties with the Chippewa Indians have been held in abeyance pending the final determination of the case of Gearlds et al. *v.* Johnson et al., our only hope lies in the enforcement of the State law. Our work along this line, however, has been to a certain extent hampered by the passage of a law by the State declaring it to be a misdemeanor to employ a decoy.

Bearing in mind, therefore, that the question is preeminently one for Congress, that that body has not acted, that there are upwards of 7,000 Indian *wards* living in the ceded district entitled to and requiring Federal protection, and that these Indians are accustomed to travel more or less over its *entire* area, there appears to be no sufficient ground upon which the prohibition of article 7 can be condemned by this court as arbitrary.

CONCLUSION.

It is respectfully submitted that this court has jurisdiction to hear this appeal; that article 7 of the treaty of 1855 was in force at the time of the acts complained of in the bill, and that the judgment of the Circuit Court should be reversed.

WILLIAM WALLACE, Jr.,
Assistant Attorney General.

APRIL, 1914.

APPENDIX.

KEY TO MAP ON OPPOSITE PAGE.

A (bounded by red border) represents tract of land ceded by the Mississippi, Pillager, and Lake Winnibigoshish Bands of Chippewa Indians to the United States under the treaty of February 22, 1855 (10 Stat. 1165).

B (solid green) represents scattered tracts ceded by the same bands to the United States under the treaty of March 20, 1865 (13 Stat. 693).

C (bounded by blue border) represents tract set aside as a home for the Mississippi Band under the treaty of 1865, *supra*, and re-ceded to the United States *by that band alone* under the treaty of March 19, 1867 (16 Stat. 719).

D (bounded by yellow border) represents tract ceded by the Red Lake and Pembina Bands of Chippewas to the United States under the treaty of October 2, 1863 (13 Stat. 667). This is the treaty which was upheld by this court in *United States* v. *43 Gallons of Whisky*, *supra*.

E (bounded by green border) represents tract ceded by the Lake Superior Band of Chippewas to the United States under the treaty of September 30, 1854 (10 Stat. 1109).

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IN THE

Supreme Court of the United States.

OCTOBER TERM 1913.

No. 802.

W. E. JOHNSON, T. E. BRENTS and H. F. COGGESHALL,
Appellants,

vs.

EDWIN GEARLDS, L. J. KRAMMER, FRED E. BRINKMAN ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF FOR APPELLEES.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

INDEX.

Cases Cited.

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BRIEF FOR APPELLEES.

Statement.

This is an appeal from the decree of the Court below, granting the appellees a permanent injunction against the appellants, in accordance with the prayer of their amended bill of complaint (R., 73). The proceedings in the Court below, as shown by the printed transcript of record, consisted of the filing of a bill of complaint in equity by the appellees against the appellants (R., 1-22), to which

appellants interposed a demurrer (R., 22, 23). Appellants' demurrer was overruled and a temporary injunction granted appellees against appellants by an order (R., 24). The lower Court in overruling said demurrer and granting said temporary injunction delivered an oral opinion (R., 24–41). The order for the temporary writ of injunction appears at R. (41, 42). The appellees filed an amended bill of complaint (R., 43–65). The appellants filed a re-amended answer (R., 66–72). It was then stipulated (R., 72) that the cause be submittted to the lower Court upon the amended bill and re-amended answer, and that a decree be entered upon said bill and answer.

Upon said bill and answer the Court entered the decree (R., 73) before referred to and subsequently an appeal to this Court was taken in proper form based upon an assignment of errors (R., 74, 75).

We shall now state as briefly as possible the essential allegations of the amended bill which are admitted by the answer. The answer contains some qualified admissions which we do not deem important, but which are set forth in appellant's brief, pages 6–10. We make the following somewhat full statement for the reason that the one contained in appellants' brief is not detailed enough to do full justice to appellees' case. The complainants are each and every one of them a resident and citizen of the City of Bemidji, Beltrami County, Minnesota, and for a number of years, varying from more than one year in the case of some to fourteen years in the case of one of them, have been continuously engaged at said City of Bemidji in the business of saloon-keeping, and in the selling and disposing at retail of spirituous and vinous liquors, beer, ale and porter, at their respective places of business in said City, and each and every one of them has paid to the Federal and State governments the necessary tax and license fee and has at all times while transacting such business held a receipt from the Federal gov-

ernment and a liquor license issued under authority of the State of Minnesota by the Municipal Council and officials of said City of Bemidji (R., 43–50).

The jurisdictional amount in excess of Two Thousand Dollars, exclusive of interest and costs for each complainant, is shown to be involved.

That neither of the defendants is a citizen of the State of Minnesota, nor a resident thereof, nor has any property therein (R., 57).

That each of the complainants has refrained from selling or disposing of any liquor to Indians, or individuals of Indian blood (R., 50, 51).

That each of the complainants has built up and established a profitable and lucrative trade in his respective place of business in the City of Bemidji; that each of them will be affected by the acts of the defendants, if done as threatened. Then follow full and complete allegations showing jurisdiction in equity.

That prior to the 22nd day of February, 1855, a tribe of Indians known as the Chippewa Indians, comprising the Mississippi, Pillager and Lake Winnebegoshish bands of Chippewa Indians, were in possession of the greater portions of the lands north of parallel 46 within the boundaries of the then territory of Minnesota, and on said date said bands of Indians entered into a treaty with the United States (10 Stat., 1165), by which there was sold and conveyed to the United States all the right, title and interest in and to the lands then owned and claimed by the said bands of Indians in the territory of Minnesota north of the 46th parallel of latitude, excepting that by the second article of said treaty there were set apart to said Indians certain reservations, the boundaries of which are shown on the map hereto appended in red ink and marked 358, 359, 453, 455, 456 and 457, none of which latter included any lands at any time within the municipal limits of the said City of Bemidji, nor any lands adjacent thereto, or

within at least ten miles thereof, and under the terms of said Treaty the United States took over and became the owner and possessor of the lands now within the territorial limits of the said City of Bemidji, and all lands adjoining and contiguous thereto for many miles to the North, West and South, and for at least ten miles to the East of where said City is now located; that among the other provisions of said Treaty there was the following:

> "ARTICLE 7. The laws which have been or may be enacted by Congress, regulating trade and intercourse with the Indian tribes, to continue and be in force within and upon the several reservations provided for herein; and those portions of said laws which prohibit the introduction, manufacture, use of, and traffic in, ardent spirits, wines, or other liquors, in the Indian country, shall continue and be in force, within the entire boundaries of the country herein ceded to the United States, until otherwise provided by Congress" (R., 54).

The boundaries of the territory ceded by said Indians to the United States by said Treaty of 1855 are indicated on the map appended to this brief, in red, and marked on said map with the figures 357.

That after the making of said Treaty of 1855 and on the 7th day of May, 1864, the said three bands of Chippewa Indians and the United States entered into another treaty (13 Stat., 693), which treaty was ratified on the 9th day of February, 1865, and was proclaimed on the 20th day of March, 1865, and under and by the terms of Article 2 of which treaty, in consideration of the cession to the United States by the said Chippewa Indians, of certain reservations provided for by the provisions of said Treaty of 1855, and set apart by that treaty for the Mississippi Band, and other considerations, there was set apart for the future home of the Chippewas of the Mississippi all the lands embraced within boundaries which are described with particularity in the complaint at (see R., p. 58).

That the land so set apart to the said Chippewas of the Mississippi, and of which, by the terms of said Treaty of 1865, they became re-possessed and the sole owners, contained all the territory now within the territorial limits of the City of Bemidji, and of the lands immediately adjacent thereto and distant several miles in all directions therefrom. That the boundaries of the territory ceded by said Indians to the United States by said Treaty of 1865 are indicated on the map appended to this brief, in blue and the tracts themselves are marked 507.

The tracts marked 358 and 359 are the reservations of the Pillager and Lake Winnebigoshish bands excepted from the description.

That on the 19th day of March, 1867, the Chippewas of the Mississippi, being the owners and in possession of the territory last referred to, by virtue of the Treaty of 1865, and the United States, again entered into a treaty (16 Stat., 719) which involved said lands, which treaty was ratified on the 8th day of April, 1867, and proclaimed on the 18th day of April, 1867, and which treaty in its entirety appears on pages 58, 59, 60 and 61 of the printed transcript of record. That by said treaty, among other things, the said Indians receded to the United States tracts 507, viz., the territory embraced in the Treaty of 1865. That the territory ceded to the United States by the Chippewas of the Mississippi by said Treaty of 1867 contained all of the territory within the territorial limits of the City of Bemidji, and for miles in every direction from the limits of said City (R., 58–61).

That the United States has carried out and performed all the obligations assumed by it under the provisions of said Treaty proclaimed on the 20th day of May, 1865, and that under the terms of said Treaty the lands now within the limits of the said City of Bemidji and adjacent thereto became absolutely the lands of the Mississippi band of Chippewa Indians; that said lands, by the provisions of said treaty of 1867, were

ceded to the United States without any restrictions or limitations whatever, and without any provisions relative to the introduction of intoxicating liquors into, or sale thereof, in such territory (R., 61).

That in and by an Act of Congress entitled "An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota," approved January 14th, 1889 (25 Stat., 642), the President was authorized, by the appointment of three commissioners, to negotiate with the Chippewa Indians in the State of Minnesota for the complete cession and relinquishment of their title to all reservations in the State, except to so much of the White Earth and Red Lake Reservations as, in the judgment of the commissioners, was not required to make the allotments provided for by said Act; and it was further provided by said Act that the acceptance and approval of said cession and relinquishment by the President should operate as a complete extinguishment of the Indian title without any further act or ceremony whatsoever. That pursuant to said Act of January 14th, 1889, the President duly appointed three commissioners to negotiate with said Chippewa Indians for the purposes set forth in said Act, and that at divers times between the 8th day of July, and the 12th day of November, 1889, agreements were entered into between said commissioners on the part of the United States, and the several bands of Chippewa Indians, by which the said Indians accepted and ratified all of the provisions of the said Act of February 14th, 1889, and granted, ceded, relinquished and conveyed to the United States all their right, title and interest in and to all of the Grand Portage, Fond du Lac, Nett Lake, Deer Creek, Leech Lake, Winnebegoshish and Chippewa Reservations, and in a like manner ceded and relinquished and conveyed to the United States all their right, title and interest in and to four townships of the White Earth Reservation and the greater part of the Red Lake Reservation, and that said agreements and cessions were

duly approved by the President on the 4th day of March, 1890 (R., 62).

That Beltrami County, Minnesota, is and ever since 1897 has been a municipal corporation of the State of Minnesota, forming a part of said State, and, as such County, has had within its territory, ever since its organization, the usual county, town, city and village officers and the various forms of local government according to the laws of the State of Minnesota applying to organized counties and lesser political subdivisions. That said City of Bemidji is the County Seat of said County and is a municipal corporation organized under the laws of the State of Minnesota as a City, and contains within its corporate limits about seven thousand inhabitants, and in connection with other municipalities, namely, villages under separate organizations but immediately adjacent to the limits of said City, and which are commercially a part of said City, constitutes a community with a population of about nine thousand people (R., 51).

That Bemidji was organized as a village in 1898; that since that time it has been a growing and thrifty town, increasing rapidly in population, and the country tributary thereto has had and enjoyed a like growth. The said City contains many blocks of substantial business buildings, hundreds of beautiful and costly residences, nine churches, four costly school houses, a costly public library, a court house and other county property of the value of at least $100,000, ten hotels, an extensive system of water works and electric light plant. The City is situated on five lines of railroads, three being either transcontinental or parts of transcontinental lines, and said City is now recognized as the metropolis of the north central portion of Minnesota.

That within distances varying from 40 to 150 miles of the City of Bemidji, on the lines of railroad to which reference has been made and which pass through said City, there are 100 towns and villages; that the assessed taxable value of real

and personal property in the City of Bemidji is the sum of $1,615,572; that the assessed taxable value of real and personal property in said County of Beltrami is the sum of $6,881,175; that the assessed valuation of all the Counties affected by the said Treaty of 1855 was in the year 1909, $93,910,142. That many farms have been opened up in all directions from the said City of Bemidji, and the country adjacent thereto not already opened up is rapidly being taken up and converted into farms; that all the country lying within the exterior boundaries of the territory covered by said Treaty of 1855 is now populated with white people (R., 52-53).

That at the time of the making of said Treaty of 1855 the land ceded by the Chippewa Indians under said treaty was a vast wilderness, altogether uninhabited by any civilized people; that since the making of said treaty and the acquisition of the territory therein ceded within the limits of the State of Minnesota, the country so ceded, with the exception of segregated portions thereof included within the reservations retained by the Indians under treaties between said Indians and the United States, has been largely developed, gradually at first, but with phenomenal rapidity within the last fifteen years, and, with the exception of a portion of such territory now included within the Red Lake Reservation, all of said lands has become populated with white and civilized people, has been opened up to settlement, and with the exception of a few square miles of land remote from railroads and streams, all such territory is organized under political sub-divisions of the State of Minnesota, and in the various communities in said territory, except in very remote portions, with a degree of civilization as advanced as in the older parts of said State, and in the larger portion of said territory various branches of industry have been established, and commercial interests have grown up, and the circumstances existing at the time of the making of said Treaty of 1855 have materially and completely changed. That according

to the returns of the United States Census of 1910 there is now in the Counties affected by said Treaty of 1855 a total white population of 382,191 (R., 62, 63).

That there is a large strip of territory completely surrounding the said Red Lake Reservation, said strip being a part of the Red Lake Reservation ceded to the United States during the year 1890, pursuant to the provisions of the Act of Congress of January 14th, 1889, which is admitted by the officers of the United States Government to be exempt from the provisions of any treaty relative to the introduction of intoxicating liquors " into the Indian country," and that the sale of intoxicating liquors in the territory between said Red Lake Reservation and the City of Bemidji, and the territory immediately surrounding the same, is permitted by the United States Government, and there exists a strip of land about 15 miles in width into which it is lawful, and so admitted by the Interior Department of the United States, to introduce intoxicating liquors, and in which territory there now are, and for more than six years last past have been, seven saloons engaged in selling intoxicating liquor of all kinds. That two of said saloons are within one and a half miles of the southern boundary of the Red Lake Indian Reservation, and in said strip and within three miles of said Reservation are three saloons selling intoxicating liquor that were conducted and in operation more than twelve years ago, and in order to reach the said City of Bemidji it is necessary for such Indians as reside on said Red Lake Reservation to cross over said strip so opened and recognized to be opened to the sale of and traffic in intoxicating liquors, and that if such Indians travel by railroad to points outside of said Reservation, and especially to said City of Bemidji, they must pass on one line of railway two saloons, and upon the other line of railroad four saloons within said territory into which it is lawful to introduce intoxicating liquors (R., 63-64).

That the laws of the State of Minnesota now, and ever

since 1866 have prohibited the sale of intoxicating liquors of any kind to persons of Indian blood without any exception or qualification, and have made a violation of this law a felony. That Indians very infrequently visit the City of Bemidji, and then only in small numbers, and for the purpose of selling berries, and there are no Indian habitations within a range of twenty miles in any direction from the said City as well as the territory surrounding it, which now is and for at least twelve years last past has been, under municipal and state government (R., 54).

That within the boundaries of said territory ceded or covered by said Treaty of 1855 there are not now any resident Indians who, or whose children, have not been for several years past allottees either under the Act of Congress of February, 1887, or January 14th, 1889. That each and all of them now are and for several years last past have been full citizens of the United States. That no Indian nor his descendant having or entitled to a residence upon or within said territory, heretofore a member of the Chippewa tribe of Indians now asserts or recognizes the existence of any tribal relationship as between himself and any other Indian, and all tribal relations as among the Chippewa tribe of Indians and the several bands of Indians originally constituting such tribe within said territory, have been abandoned and set aside and are now ignored, and the members heretofore constituting such bands of said tribe within said territory now recognize no allegiance to any chief or leader or other authority among such Indians. That there are not now any Indian Reservations of any kind within such territory, and that all of the lands embraced within the exterior boundaries of said territory affected by the said Treaty of 1855 have been ceded to the United States, or have been disposed of under the laws of the United States relating to the disposition of public lands, or have been designated as forestry reserve, or have been allotted to the individual Indians, except

such small portions of land as have been retained by the United States Government at its former Indian agencies, a part of which latter is an area of land not exceeding 160 acres on what was formerly the White Earth Reservation, and upon a portion of which stand the old agency buildings and Indian school-houses, and upon which is situated the townsite of White Earth, lots in which townsite are now being sold by the United States Government to white people or Indians as applications therefor are made; and an area of about 600 acres at a point of land in Leech Lake, upon which is located the old Indian agency buildings and Indian school buildings; an area of land less than 80 acres north of Cass Lake upon which are buildings formerly used for an Indian school, and a tract of land of less than 200 acres upon which are the buildings for an Indian school at Bena, Minnesota, the use of which for such purposes has been abandoned.

That the said land at White Earth and Leech Lake upon which are located the buildings occupied by the superintendents of Indian schools and disbursing agents, is more than 40 miles distant from said City of Bemidji; that since the allotments to the Indians herein referred to the duties and authority of the Indian agents in said territory have been materially changed and modified, and the officers acting in that capacity have now practically no duties to perform, except to superintend the affairs relating to Indian schools and to disburse annuities to the Indians (R., 53, 54). Such annuities are the proceeds of the sale of the former tribal lands.

That during the fifty-five years elapsing since the making of said Treaty of 1855 no effort has been made, either by Federal or State authority, until recently, to wit, September 17th, 1909, to prevent the introduction into, sale of and traffic in intoxicating liquors in any of the territory ceded by the Chippewa Indians to the United States under said Treaty of 1855, and no prosecution has been insti-

tuted by the United States charging such introduction, except that in 1905 the United States instituted criminal prosecution against one Hugh Funk for having introduced, in violation of Article 7 of said Treaty, intoxicating liquors into the Village of Ballclub which is within said cession of 1855. That during all of that period and for more than thirty years last past licenses have been granted by State and municipal authorities to sell and dispose of intoxicating liquors in all said territory outside of said reservations, and during all of said time the United States Government has accepted, from persons who desire to engage in such business, the special tax on the business of retail liquor dealing in all of said territory, and has issued its receipts therefor, conferring upon the individuals to whom the same were issued the authority of the United States Government to sell and dispose of intoxicating liquors in quantities of less than five gallons at a time, and it has only been within the last several months that representatives and agents of the Indian Department of the United States Government have undertaken to prevent the introduction and sale of liquor in said country, or to interfere with, or molest, persons engaged in the sale and disposition of intoxicating liquors in any portion of said ceded territory (R., 56, 57).

That the defendants, especially W. E. Johnson and T. E. Brents, acting in conjunction and in unison as special officers connected with the Indian Department, as administered by the Interior Department of the United States Government, and claiming to act under authority conferred by said Article 7 of said Treaty of 1855, and the provisions of Sections 2139 and 2140 of the Revised Statutes of the United States and amendments thereof, at various towns and cities of northern Minnesota included within the territory ceded by the said Treaty of 1855, including the City of Brainerd, the county seat of Crow Wing County in said State, the village of Walker, the County seat of Cass County in said State, the village of Bagley, the county seat of Clearwater County in said State, the village of

Grand Rapids, the county seat of Itasca County in said State, the village of Park Rapids, the county seat of Hubbard County in said State, the City of Detroit, county seat of Becker County in said State, and many other towns and villages in said territory ceded as aforesaid, and in each of which places or over the inhabitants of which the jurisdiction of the State of Minnesota for all purposes of government was full and complete, and generally recognized so to be, entered upon private property where individuals and concerns were engaged in the sale of intoxicating liquors and in each of which instances the persons so concerned and engaged had licenses from the United States Government to sell at retail and also licenses from the county or municipal government to sell and dispose of such liquors under licenses authorized to be issued under the laws of the State of Minnesota, and in instances destroyed such liquors and stock, and in other instances compelled the proprietors who were engaged in the business of vending such liquors to ship the same to other and remote portions of such State, and into territory beyond the limits of the land ceded by the said Chippewa Indians to the United States under said Treaty of 1855, and then and there claimed and asserted that the City of St. Paul was the nearest point into which intoxicating liquors might be shipped, and the nearest point in the State not coming within the provisions of some Treaty against the introduction of intoxicating liquor in Indian country, and ordered and directed the proprietors of such places to close up their places of business, and to desist from further engaging in such business at said places, and threatened to arrest and prosecute such proprietors under the claim that they are unlawfully selling and disposing of liquor in "the Indian country," contrary to the provisions of the said statutes, and the said Article 7 of said Treaty of 1855; and said defendants, and especially the said T. E. Brents and H. F. Coggeshall, acting jointly and in unison, did on

the 9th day of December, 1910, order and direct twenty other saloon keepers in the said City of Bemidji holding licenses issued by the Federal Government, and municipal licenses issued under the authority of the State of Minnesota, authorizing them to sell intoxicating liquors, at retail in quantities less than five gallons at a time, to close up their places of business, and to desist further in the sale and disposition of such liquors in said City of Bemidji, and ordering and directing such saloon-keepers to ship out such stocks of goods as they had on hand, and on such day and date, to wit, said 9th day of December, 1910, the defendants T. E. Brents and H. F. Coggeshall acting jointly in the premises, and in connection with the defendant W. C. Johnson and under his instructions, ordered and commanded each of the said complainants to close up his place of business and remove and ship out his stock of liquors, of which each of said complainants then had on hand a quantity, and commanded each of these complainants to refrain from further engaging at said City of Bemidji in the business of selling and disposing of intoxicating liquors. That the defendants and each of them are now threatening in case said complainants, or either of them, fail to observe the orders so given, to enter upon the premises of each of the said several complainants, and to close up the business of said complainants, and each of them, and to destroy the stocks of liquor now in the possession of said complainants, and each of them, and the utensils and wares used and employed in the vending of same, and to ruin and destroy the established business of each of the complainants, and the said defendants, and each of them further threaten, in the event of the refusal of the said complainants or either of them to obey and recognize the orders so given, to arrest and cause to be arrested said complainants, and each of them, charged with the unlawful introduction, sale and disposition of intoxicating liquors as in "the Indian country" (R.. 55, 56).

On information and belief that defendants are not financially responsible, and that any judgment that might be recovered against them, or either of them in an action at law, would not be collectible; that the complainants have no remedy against defendants should they carry out such threats as aforesaid, but such as may be afforded in this equitable proceeding, and that unless restrained and enjoined by the court from so doing, defendants will carry out the threats so made on the ground that the complainants are unlawfully selling and disposing of intoxicating liquors in "the Indian country", and in violation of the provisions of Sections 2139 and 2140 of the United States Statutes and amendments thereof (R., 57).

Then follows the prayer of the complaint for an injunction restraining defendants from carrying out the said threats (R., 64, 65).

I.

The Jurisdiction.

This Court has not jurisdiction of this direct appeal.

In their argument to the effect that this Court has jurisdiction, the appellants contend that upon the final submission of the matter to the lower Court there must have been presented to that Court for decision

(1) Was Article 7 of the Treaty of 1855 repealed by the Minnesota Enabling Act?

(2) Did the power of Congress to regulate commerce with Indian tribes survive the admission of Minnesota to statehood, in the absence of an express reservation to this effect?

(3) Was Article 7 of the Treaty of 1855 repealed by the subsequent treaties of 1865 and 1867?

Assuming the foregoing, the appellants contend that they are entitled to take a direct appeal to this Court under Section 238 of the Judicial Code upon the three following grounds:

(1) The construction or validity of Article 7 of the Treaty of 1855 is drawn in question.

(2) The construction or application of the Constitution is involved.

(3) The construction of the Treaties of 1865 and 1867 is drawn in question.

On the question of jurisdiction we shall follow the headings of appellant's brief.

At the outset we concede that while the ground of the decision of the lower court as shown by its opinion is important in the determination of whether or not a direct appeal may be taken to this Court, it is by no means conclusive, and that if, from the record, it is clearly apparent that the case involved the construction or application of the Constitution of the United States, or drew in question the validity or construction of any treaty that this Court has jurisdiction.

(1) Is the construction or validity of Article 7 of the Treaty of 1855 drawn in question?

(a) Construction.

Article 7 is as follows:

> "The laws which have been or may be enacted by Congress, regulating trade and intercourse with the Indian tribes, to continue and be in force within and upon the several reservations provided for herein; and those portions of said laws which prohibit the introduction, manufacture, use of, and traffic in, ardent spirits, wines, or other liquors, in the Indian country, shall continue and be in force, within the entire boundaries of the country herein ceded to the United States, until otherwise provided by Congress."

The foregoing is not only the correct wording of Article 7, but is accurate in regard to punctuation. As important hereafter, we call attention to the fact that the first clause is terminated by a semi-colon and not a comma, as shown on page 11 of appellant's brief.

The purpose of the parties to the Treaty of 1855 in incorporating this Article would seem to be perfectly clear. It had two objects in view. One to provide that the laws of Congress, present and future, regulating trade and intercourse with the Indian tribes, were to continue and be in force within the reservations created by the treaty; the other to keep in force in the ceded country (which of course excludes the reservations provided for by the treaty) until otherwise provided by Congress, the portions of said Federal laws prohibiting the introduction, manufacture, use of and traffic in ardent spirits, wines and other liquors in the Indian country. Certainly, standing by itself, Article 7 does not require any construction.

> " *Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the Legislature should be intended to mean what they have plainly expressed, and, consequently, no room is left for construction.* But if, from a view of the whole law, or from other laws *pari materia* the evident intention is different from the literal import of the terms employed to express it in a particular part of the law, that intention should prevail, for that in effect is the will of the Legislature." *U. S. vs. Fisher*, 2 Cranch, 358.
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> "Indeed, cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of *ambiguity* that an extended review of them is quite unnecessary." *Hamilton vs. Rathbone*, 175 U. S., 414.

The argument of appellants that Article 7 of the Treaty of 1855 is drawn in question is based upon the contention made in the lower court, and the basis of the decision of that court

as indicated by its opinion, that by the Minnesota Enabling Act Article 7 was impliedly repealed. As an examination of Article 7 shows, its language is perfectly clear. An examination of the Minnesota Enabling Act shows that it is absolutely silent on the subject of Indians. The contention of the repeal of Article 7 by the Enabling Act is based upon the fact that, without any mention whatever of Indians or pre-existing Indian treaties or laws, the first section of the Act provides:

> "That the State of Minnesota shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever."

The phraseology of this section is clear and not open to doubt. In what manner does the contention that by the Enabling Act of Minnesota containing such a section, and without any saving clause in regard to Indian treaties, an intention is shown on the part of Congress to repeal Article 7 of the Treaty of 1855, draw in question the *construction* of that Article? It might possibly be said to draw in question the construction of the Enabling Act, but how it can draw in question the *construction* of Article 7 (when the contention is simply that it ceased to exist because of an intention claimed to have been shown by Congress in an Enabling Act to repeal it), is beyond our ability to comprehend.

The appellants cite *U. S. vs. Wright*, 229 U. S., 226, as indicating that a decision that there has been an implied repeal of one statute by another, necessarily involves the construction or invalidity of the statute decided to have been repealed.

This is a conclusion which is drawn by the appellants themselves, and not by the court in the decision.

We do not think the construction of Article 7 of the Treaty of 1855 can be said to have been drawn in question in

the sense in which it is necessary, under Section 238 of the Judicial Code, in order to give this court jurisdiction.

(*b*) *Validity.*

It is contended by appellants that the validity of Article 7 is drawn in question because of the contention, sustained by the lower court, that it was repealed by the Minnesota Enabling Act. They arrive at this conclusion by the application of the following quotation from the opinion of Mr. Justice DAY in *Champion Lumber Co. vs. Fisher*, 227 U. S., 445-451:

> "The validity of a statute of the United States * * * is drawn in question when the *existence* (the italics are appellants') or constitutionality or legality of such law is denied."

In other words, the appellants understand the court to use the word *existence* in the foregoing case in the sense of present or continued existence in fact, so that if, at any time, it is claimed that a law which had once been legally in existence had ceased to exist by repeal, that the validity, because the present existence, of such law would be drawn in question. We think the appellants have entirely misapprehended the sense in which the word *existence* is used in the language quoted.

To support the language quoted from the Champion Lumber Co. case this court cites:

U. S. vs. Lynch, 137 U. S., 280.
Linford vs. Ellison, 155 U. S., 503.
Snow vs. U. S. 118 U. S., 346, 353, and
McLean vs. R. R. Co., 203 U. S., 38.

Considering them in the chronological order of their rendition, we first turn to *Snow vs. U. S.*, 118 U. S., 346. The court held that the validity of no statute of the United States was drawn in question, the question involved being whether the authority exercised by a lower

court, under an Act of Congress, was a valid authority and within the scope of the Act.

On page 353 the court said :

> " The authority exercised by the court in the trial and conviction of the plaintiff in error is not such ' authority ' as is intended by the Act. *The validity of the existence* of the court, and its jurisdiction over the crime named in the indictment, and over the person of the defendant, are not drawn in question. All that is drawn in question is whether there is or is not error in the administration of the statute."

The words we have italicized throw some light upon the sense in which the word *existence* is used in the case quoted by appellants.

The next case cited is *U. S. vs. Lynch*, 137 U. S., 280. The opinion was by Mr. Chief Justice FULLER, and on page 285 he made use of the exact language used by this court in the Champion Lumber Company case.

The next case was *Linford vs. Ellison*, 155 U. S., 503, Mr. Chief Justice FULLER delivering the opinion, and on page 508 he quotes his language in the case of *U. S. vs. Lynch* just referred to, and in addition said :

> " In Baltimore & Potomac R. R. v. Hopkins, 130 U. S., 210–226, the question in controversy was whether a railroad corporation, authorized by Acts of Congress to establish freight stations and to lay as many tracks as ' its president and board of directors might deem necessary ' in the District of Columbia, had the right to occupy a public street for the purposes of a freight yard. It was argued that the validity of an authority exercised under the United States to so occupy the public streets was drawn in question ; but this court held otherwise and said : ' The validity of the statutes and the validity of authority exercised under them, are in this instance, one and the same thing ; and the ' validity of a statute ' as these words are used in

> this Act of Congress, *refers to the power of Congress to pass the particular statute at all*, and not the mere judicial construction as contradistinguished from a denial of the legislative power.' "

In this case Mr. Justice HARLAN dissented, and on page 512 of the report, speaking of the decision in the Hopkins case said:

> " The dispute was as to the construction, not the validity, of the Act of Congress. I cannot suppose that the Hopkins case would have been determined as it was, *if it had appeared that the authority of Congress to pass the Act referred to was drawn in question.*"

The last case cited by this court in the Champion Lumber Company case is *McLean vs. R. R. Co.*, 208 U. S., 38, the opinion being by Mr. Justice DAY, who, upon page 48, said:

> " It is not a case merely involving the construction of a legislative act of the territory, as was the fact in Snow v. U. S., 118 U. S., 346. *The power to pass the Act at all*, in view of the requirements of the Constitution of the United States, is the subject matter in controversy, and brings the case in this aspect within the second section of the Act."

In none of the foregoing cases was the question of the then present *existence in fact* of a statute drawn in question. It is our contention that when this court, in the case of U. S. vs. Lynch used the words

> " the validity of a statute or the validity of an authority is drawn in question when the existence, or constitutionality, or legality of such statute or authority is denied and the denial forms the subject of direct inquiry,"

the word *existence* was used, and has always been used by this court, in the sense of original constitutional and legal exist-

ence, and not in the sense of mere *existence* in fact at any subsequent time. The existence in fact of a statute is a condition precedent to the drawing in question of its validity, and the test of whether or not its validity is drawn in question is to be found in decisions of this court to which we shall now refer, and which must be read in connection with the words used in the Lynch and Champion Lumber Company cases, in order to understand the sense in which the word *existence* is used in those opinions.

Inasmuch as the words upon which the appellants depend for jurisdiction, on the ground of the drawing in question of the validity of Article 7 of the Treaty of 1855, were written by Mr. Chief Justice FULLER, we call the court's attention to a case, preceding the Lynch case, in which he also wrote the opinion.

This is the case of *Baltimore & Potomac R. R. Co. vs. Hopkins* already mentioned as cited by Mr. Chief Justice FULLER in the case of *Linford vs. Ellison*. We think this may be considered the leading modern case on this subject decided by this court. The question involved was whether or not the Railroad Company had a right or authority under certain Congressional statutes having force in the District of Columbia to do certain things in streets of the City of Washington involving damage to Hopkins. It was contended that this court had jurisdiction by writ of error because there was drawn in question the validity of the statutes under which the authority was claimed and of the authority itself. The writ of error was dismissed on the ground that the validity of no authority or statute was involved.

The court in its opinion lays down the test by which to determine whether or not the validity of a statute is drawn in question, on page 224, in the following words:

> " *Whenever the power to enact a statute as it is by its terms, or is made to read by construction, is fairly open*

to denial and denied, the validity of such statute is drawn in question, but not otherwise.

"In *Millingar vs. Hartupee*, 6 Wal. 258-261-262, it was held that the word 'authority' stands upon the same footing with 'treaty' or 'statute'; and said the court, through Chief Justice CHASE, 'something more than a bare assertion of such an authority seems essential to the jurisdiction of this court. The authority intended by the act is one having a *real existence derived from competent governmental power*. If a different construction had been intended Congress would doubtless have used fitting words. The act would have given jurisdiction in cases of decisions against claims of authority under the United States.' 'In many cases, the question of the existence of an authority is so closely connected with the question of its validity that the court will not undertake to separate them, and in such cases the question of jurisdiction will not be considered apart from the question upon the merits, or except upon hearing in regular order. But where, as in this case, the single question is not of the validity, but of the existence of an authority, and we are fully satisfied that there was and could have been no decision in the State court against any authority under the United States *existing in fact*, and that we have, therefore, no jurisdiction of the case brought here by writ of error, we can see no reason for retaining it upon the docket.'"

On page 226 is contained the portion of the opinion quoted and already referred to in *Linford vs. Ellison*.

In *Clough vs. Curtis*, 134 U. S., 361, Mr. Justice HARLAN, on pages 369, 370, makes the following statement:

"In this respect the present case differs from the B. & P. R. R. v. Hopkins, 130 U. S., 210, 225, upon writ of error to the Supreme Court of the District of Columbia. In that case it was held that the words in the Act of March 3rd, 1885, 23 Statutes 443, C. 375, the validity of a 'statute of or an authority exercised under the United

> States' do not embrace a case, which depends only on a judicial construction of an act of Congress, *there being no denial of t e power of Congress to pass the act, or of the right to enjoy whatever privileges are granted by it.*"

In *New Orleans vs. N. O. Water Works Co.*, 142 U. S., 79, the court, by Mr. Justice BROWN, on page 87, approves the wording of the opinion in *Millingar vs. Hartupee* before referred to.

In *Miller vs. Cornwall R. R. Co.*, 168 U. S., 131, Mr. Chief Justice FULLER uses the following language on page 133:

> "The validity of a statute is drawn in question whenever the power to enact it, as it is by its terms, or is made to read by construction, is fairly open to denial and is denied" (*B. & P. R. R. Co. vs. Hopkins*, 130 U. S., 210-224).

In *Sweringen vs. St. Louis*, 185 U. S., 38, this court, by Mr. Justice PECKHAM, on page 44, said:

> "In the Hopkins case, *supra*, it was held that the validity of a statute is drawn in question when the power to enact it is fairly open to denial and is denied, but not otherw se."

Is it not perfectly clear under the decisions to which we have last called attention that the word "*existence*" was used in the Champion Lumber Company, Lynch and other cases in the sense which we have imputed to it, and that the test of whether or not the validity of a statute is drawn in question is the one laid down by Mr. Chief Justice FULLER? Possibly the clearest and best evidence of this is the fact that in *Linford vs. Ellison* the Chief Justice quotes from both the Lynch and Hopkins cases, showing conclusively that, in his opinion, and that of the court whose decision he was rendering, the statements contained in both opinions amounted to

the same thing. The test laid down in the Hopkins case is one to which the words used in the Lynch case can be easily reconciled in the manner we have suggested, whereas if the word *existence* is used in the sense contended for by the government in this case, there is an irreconcilable conflict between the decisions. No better illustration of the difference between the contention of appellants and the one announced by Mr. Chief Justice FULLER can be conceived of than the case at bar, and the case of *U. S. vs. 40 Gallons of Whiskey*, 93 U. S., 188. In that case the validity of the Article, similar to Article 7 of the Treaty of 1855, was directly drawn in question, because the *power of Congress to enact it* was directly denied on the ground that it was an interference with powers belonging to the State of Minnesota, whereas in the case at bar the lower court, recognizing that by the decision in the Whiskey Case this court had held that Congress had the *power* to place such a provision in a treaty and keep it in force within a state, simply decided that it had not exercised that power, but had done the contrary, namely, repealed such a provision by an Enabling Act not referring to or saving it. In this case no one challenges the validity, namely, the power of the United States and the Indian tribes to enter into the agreement containing Article 7, or the *power* of Congress to keep it in force after the territory became a state.

If the contention of appellants were upheld, the calendar of this court, which it was sought to relieve by the Court of Appeals Act of 1891, would be congested even more than it now is, by appeals from decisions simply involving the repeal of previously existing *valid* statutes or treaties, whereas such cases should go to the Circuit Court of Appeals where this case should have gone.

(2) Is the construction or application of the Constitution involved?

Under this heading appellants apparently contend that the construction or application of the Constitution of the

United States was involved because, to quote from page 19 of the brief:

> " In the absence of an express reservation in favor of Congress in the Enabling Act, the question was which power should prevail in the resulting conflict, or, in other words, is the power of Congress broad enough to survive the creation of a state out of territory in which Indians are situated. The construction of the Constitution was thus involved within the meaning of Section 238 ".

It is very hard for us to take this contention seriously. The lower court was perfectly conversant with *U. S. vs. 40 Gallons of Whiskey*, and *Dick vs. U. S.*, 208 U. S., 340. In his opinion (R., 26, 27) the lower court said:

> " It may be argued that the authority of the case of U. S. v. 43 Gallons of Whiskey has been somewhat qualified by what was said in the case of Dick v. U. S. and by the fact that the case of U. S. v. Sutton, *supra*, was put upon somewhat different grounds. It was nevertheless, in the first case distinctly held that *Congress had the power not only to prohibit the introduction of liquor into Indian reservations, into what was in fact Indian country, but also to prohibit the introduction of liquor into adjoining country, not Indian country, but within the limits of an organized State. So far as this court is concerned that statement must be considered as binding upon it. The law must be considered as settled that Congress has the power to prohibit the introduction of liquor into lands not Indian country, but adjoining it, within the limits of a State.* But when this is admitted and conceded, the present case is not yet, in my judgment, resolved. The question here presented is not a question as to the power of Congress, and I have already said, it is within the power of Congress, after a State has been admitted to the Union, to prohibit the introduction of liquor into not only Indian country, but

into the adjoining country. That it had that power before the State was admitted, and while the land was within the limits of the territory is unquestioned. At the time when the Treaty of 1855 was negotiated the Government undoubtedly had the power to insert therein the provisions therein contained. *So it is not at all a question of power*, but it is a question whether that provision in the Treaty of 1855 is still in force, or whether any subsequent act of Congress has modified or repealed it."

Nothing that we can add can make it any clearer that the lower court not only did not consider that it was open to question that Congress had the power to bring into existence Article 7 of the Treaty of 1855, but to continue it in existence after the State was admitted to the Union, and that the ground upon which he decided adversely to the defendants, and to the existence of Article 7, was that by the wording of the Enabling Act of Minnesota Congress had shown its intention *not to exercise its power* within the limits of Minnesota after it became a State. It seems to us to take a very vivid imagination to see that the application or construction of the Constitution was involved in this case, or by the decision in it.

(3) Is the construction of the Treaties of 1865 and 1867 drawn in question?

For the reasons and upon the authority of the cases cited in our attempt to answer the proposition contained in (1) of appellants' brief, as to whether the construction of the Treaty of 1855 is drawn in question, we contend that the question whether or not the Treaties of 1865 and 1867 repealed Article 7 of the Treaty of 1855 does not involve the construction of the later treaties. The Treaties of 1865 and 1867 are absolutely silent on the liquor question, and as we have suggested, Article 7 of the Treaty of 1855 is too clear in its phraseology to leave any office for construction to perform. We do not,

therefore, conceive that the construction of the Treaties of 1865 and 1867, or either of them, was drawn in question.

Counsel has himself suggested under this heading that it will undoubtedly be argued that this question was not decided by the court upon the demurrer, and that for that reason the present appeal will not lie on this ground. It is suggested that the court may have entered its decree upon an entirely different opinion, unuttered, than the elaborate opinion rendered in the decision on the demurrer.

We submit that upon the record the presumption is that the court was satisfied with its decision upon the demurrer and therefore adopted it as a basis for entering its decree.

We call the court's attention to the fact that the matters referred to on page 25 of appellants' brief as having been subsequently pleaded in the amended bill and issue taken thereon in the amended answer involving the Treaties of 1865 and 1867 are conclusions of law pure and simple. The only *facts* in regard to the treaties of 1865 and 1867 alleged in the amended bill and amended answer are not sufficient to justify the position taken by counsel, that *facts* pleaded in the amended bill draw in question the construction of either of the treaties of 1865 or 1867. If every time an unambiguous statute or treaty is claimed to have been impliedly repealed by another unambiguous statute or treaty, there is drawn in question the *construction* of the one claimed to have been repealed, this court has jurisdiction under heading (1) or (3), but if that is the law, the purpose of the Court of Appeals Act and its successor, section 238 of the Judicial Code, will have been largely frustrated and the overcrowded calendar of this court rendered infinitely more congested by floods of direct appeals that we believe it was intended should go to the Circuit Courts of Appeal.

II.

The Merits.

Still following the frame-work of appellants' brief we come first to their contention (1) **Article 7 of the Treaty of 1855 was not repealed by the Minnesota Enabling Act, nor by the Act admitting that State into the Union.**

Under this heading appellants deal with the ground upon which the Trial Court based its decision. As we have already set forth by quotation from the opinion of the lower court, the decision was based *not upon any lack of power on the part of the United States by treaty with the Indians to keep Article 7 in force after Minnesota became a State*, but solely for the reason that by the Act admitting Minnesota into the Union Congress had shown its purpose *not to exercise that power within the borders of Minnesota after it became a State.*

Appellants in their brief under this heading again seek, as they did in trying to establish this court's jurisdiction on the ground that the Constitution is involved, to show the existence before the lower court of a controversy between the State and Federal authorities in regard to commerce or relations with the Indians, such controversy being supposed to be based upon the power of Congress, under the Federal Constitution on the one hand, and the general police power of the State of Minnesota on the other. It being perfectly clear from the opinion of the lower court, already quoted, that no such controversy was decided by the Court, we shall pay no further attention to this suggestion.

The argument under this heading being directed against the grounds upon which the lower court based its opinion, and that opinion being elaborate and printed in full in the record, we shall depend upon it to speak for itself, contenting ourselves with briefly pointing out a few reasons not contained in

the opinion why the decision upon this ground should be sustained.

In the first place, there can be no dispute whatever over the fact that, under the commerce clause of the Constitution, Congress has the power to regulate all intercourse with Indian tribes, and that that power has by this court been enlarged to include intercourse with individual tribal Indians as well as tribes. Pursuant to the power conferred by the commerce clause of the Constitution, Sections 2139 and 2140 of the Revised Statutes of the United States, as amended, were enacted and have been in force. Those sections, by their own force and without any treaty stipulations to assist them, would have been amply sufficient to have prevented the sale of liquor to Indians, and to have prevented the introduction, etc., of liquor into what was *in fact* Indian country. It is true the first clause of Article 7 of the Treaty of 1855 extended the present and future laws of Congress regulating trade and intercourse with the Indian tribes to the reservations provided for in the Treaty, but we take it that there can be no question but that these laws would have been *ipso facto* extended to these reservations upon their creation as such.

It is upon the legal existence and force of the second clause of Article 7 that appellants must depend. That portion of the Article arbitrarily makes *Indian country* out of approximately twenty-one thousand square miles of land (over 13,000,000 acres) involved in the cession (irrespective of whether or not it should be so in fact) until otherwise provided by Congress. This provision is not a natural or normal one, and it cannot be said to be made in the exercise of the power conferred upon Congress by the commerce clause of the Constitution. Article 7 is made by virtue of the treaty-making power and the peculiar relations with the Indian tribes. Under normal conditions the scope of Revised Statutes of the United States having to do with Indian country, such as those involved in this case,

prohibiting the introduction, etc., of liquor into Indian country, would be worked out by the courts, and would be dependent upon the definition of Indian country upon which this court should settle, in the absence, of course, of any authoritative definition by Congress.

This court has settled upon such a definition in *Bates vs. Clark*, 95 U. S., 204, where, on page 208, Mr. Justice MILLER, delivering the opinion of the court, said:

> " The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case."

That rule has been affirmed and adopted by this court many times since, and it is to-day the judicial test by which to determine whether or not certain territory is Indian country. Since it was laid down by this court Congress has enlarged this definition of Indian country by Chapter 109 of the Act of January 30th, 1897 (29 Statutes at Large, 506) which amends Sections 2139, 2140 and 2141, R. S. By this Act Congress added to the definition laid down in *Bates vs. Clark*, the following

> " which term shall include any Indian allotment while title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States."

The history of Indian treaties, and decisions of this court dealing with the Indians, will not be found very prolific of treaty or statutory provisions having the purpose of Article 7

of the Treaty of 1855, by which over twenty-one thousand square miles of land in a State are arbitrarily made Indian country, irrespective of how many acres of such land were *in fact* Indian country. We challenge the Government to produce a single similar instance where, by treaty or statute, Congress has brought into the Union a State within whose limits it has arbitrarily made nearly one-third of its territory artificial Indian country. Under the circumstances is it not apparent that Congress would be doing the *normal*, not the unusual, thing in repealing Article 7 by the Act admitting Minnesota into the Union entirely silent on the subject? Is it not the reasonable result of the fact that, without any such arbitrary provision, the Revised Statutes, in reference to the sale of liquor to the Indians or the introduction of liquor into Indian Country, would, by their proper enforcement, protect the wards of the Government, or, if not, that Congress could by appropriate legislation under the commerce clause have made Indian country of a strip of Government land of such width surrounding the reservations as would be sufficient to keep such lands from being a base from which to introduce liquor into actual Indian country, without forcing prohibition on 382,000 white persons?

With these suggestions we leave the opinion of the lower court to speak for itself.

(2) Article 7 of the Treaty of 1855 was not repealed by the Treaties of 1865 and 1867.

This proposition of appellants is based upon the theory that the contended repeal of Article 7 by said Treaties is dependent upon the rule that a reconveyance to the original grantor of land to which a covenant relates has the effect of extinguishing the covenant, and that inasmuch as the reconveyance of tracts 507 on our map were not to the original grantors under the Treaty of 1855, but to one of them only, namely the Mississippi band, that, therefore, the rule is not applicable in this case; and second, that even if the recon-

veyance may be regarded as to the original grantors it is not to be supposed that the operation of treaties is governed by any such technical rule of property.

We think appellants entirely misconceive the scope of the argument that Article 7 was repealed by the Treaties of 1865 and 1867. It is not based upon any technical rule of property. By the Treaty of 1855 the three bands of Indians ceded to the United States the approximately twenty-one thousand square miles of land, being the largest tract inclosed in red upon our map and marked 357. There were excepted from that cession the reservations created for the Mississippi band by the Treaty of 1855, and marked Nos. 453, 455, 456 and 457 on our map, as well as the reservations provided for the other two bands and marked, on our map, 358 and 359. The first clause of Article 7 did not refer to the ceded territory, but referred merely to the reservations which we have just mentioned, provided by the Treaty for the three bands who were parties to it. It is only the second clause of Article 7 in regard to the introduction of liquor into Indian country which applied to the ceded territory.

When the Treaty of 1865 was entered into the situation was as follows—the Mississippi band of Chippewas was the owner of four reservations within the exterior limits of the cession of 1855. These reservations were not covered by the second portion of Article 7. They were simply, as Indian reservations, subject to all of the laws of the United States regulating commerce and intercourse with the Indian tribes which would naturally be in force on reservations, which were Indian country in fact. The parties to the Treaty of 1865 were the United States on the one part, and the three bands of Chippewa Indians who were parties to the Treaty of 1855 on the other. By that Treaty the Mississippi band ceded unreservedly to the United States its four reservations which had been set aside for it in the Treaty of 1855. In return therefor the United States ceded to the Mississippi band the descrip-

tions marked on our map 507, except so much thereof as involved the reservations 358 and 359, belonging to the other two tribes, which had been set aside by the Treaty of 1855. Counsel says that this cession No. 507 was to only one of the tribes, namely the Mississippi band, but the other two tribes were parties to the Treaty, and must naturally be considered by their participation to have placed the Mississippi band in the same position, so far as title was concerned, as would have been the case had it been ceded to all three.

When in 1867, in return for the White Earth reservation, marked on our map 509, the Mississippi band of Chippewas re-ceded tracts 507 to the United States, they ceded the same title and with the same right and power over those descriptions that the three original tribes would have had, and the three original tribes would have unquestionably been able to *recede this property free and clear of Article 7 of the Treaty of 1855.*

On page 43 of their brief appellants argue that "if Congress had specifically provided that Tract A (our 357) should be Indian country in spite of this original cession, and the consequent extinguishment of the Indian title thereto, no one would contend that the reconveyance of a part of that Tract (Tract C) or even the whole of it to the Indians would have any effect on the operation of the statute."

We do not contend that an Indian treaty will necessarily repeal an act of Congress, but we do maintain that a treaty between certain bands of Indians and the United States can modify or repeal a prior treaty between the same parties. *Wiggan vs. Connolly*, 163 U. S., 56-60.

It is not necessary to contend that Article 7 was repealed by the treaties of 1865 and 1867. *The contention really is that 507 was withdrawn from the territory subject to it.*

Under a heading numbered (3) on page 44 of their brief appellants consider the last assumed ground of

contention that Article 7 of the Treaty of 1855 is no longer in force, under the heading

> **"Article 7 of the Treaty of 1855 had not expired at the time of the acts complained of in the bill by reason of any change in the character of the territory to which it applied."**

We at this point depart from the plan we have been pursuing of simply meeting the propositions urged by the appellants, and consider the contention we now desire to make under a heading of our own, as follows:

> **"Article 7 of the Treaty of 1855 had expired at the time of the acts complained of in the bill by virtue of the provisions of the Act of Congress of January 14, 1889, 25 Statutes at Large, 642, entitled, 'An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota,' the cessions made to the United States by the Chippewa Indians of Minnesota pursuant to said act, and by reason of the change in the character of the territory included in the Treaty of 1855 and the status of the Indians therein."**

At the outset we desire to call the court's attention to pages 53 and 54 of appellant's brief, at the point commencing on page 53 with the words "finally the need for protection cannot be over-emphasized." Then follows a statement about the situation among the Indians supposed to have been obtained from the 1912 Report of the Commissioner of Indian Affairs, followed by a quotation from the Report. Upon what theory any of it is properly included in the brief we are unable to perceive. The alleged facts are not contained in either the amended bill or amended answer, and have no proper relevancy or materiality to the issues here involved.

We trust the Court will pardon us some repetition in laying the foundation for the point we now wish to make.

By the Treaty of 1855 between the United States and the three bands of Chippewa Indians a certain description, 357 on our map, containing approximately 21,540 square miles, the exterior boundaries of which are shown on our map in red, was ceded by the Indians to the United States. There were within those exterior boundaries certain tracts which were not ceded to the United States, but which were retained by the Indians as reservations. Nos. 453, 455, 456 and 457 were retained as reservations for the Mississippi band. Other descriptions which are shown on our map as 358 and 359 were retained for the Pillager and Lake Winnebegoshish bands.

Article 7 of the Treaty of 1855 contains two distinct provisions. The first one provides

> " the laws which have been or may be enacted by Congress, regulating trade and intercourse with the Indian tribes, to continue and be in force within and upon the several *reservations* (italics ours) provided for herein ; "

As the most cursory examination shows this portion of the Article applies only to the reservations set apart for the three bands. It was entirely unnecessary and is simply declaratory of the laws of the United States regulating trade and intercourse with the Indian tribes, which would have been in force in the reservations irrespective of this provision in Article 7. It does not provide, like the second clause, that such laws, or any portions thereof, shall be in force within the reservations *until otherwise provided by Congress.* The only reasonable construction that can be placed upon it, and one which would seem to be too clear for controversy, is that *so long as the several reservations provided for by the Treaty of 1855 should remain reservations,* namely Indian country in fact, the laws regulating trade and intercourse with the Indian tribes should continue and be in force within them.

It must be borne in mind that, by the Treaty of 1855, the three bands of Chippewa Indians gave up *no part* of their

right, title and interest in and to any of the reservations provided for in said Treaty.

The second part of Article 7 provides

> "and those portions of said laws which prohibit the introduction, manufacture, use of, and traffic in, ardent spirits, wines, or other liquors, in the Indian country, shall continue and be in force, within the entire boundaries of the country *herein ceded* to the United States, until otherwise provided by Congress."

This portion of Article 7 applies merely to the ceded territory. Not only was it not necessary as to the reservations, but the language does not permit of its application to them.

By the first clause of the Article *all* of the laws, and *every part* of them, regulating commerce and intercourse with the Indian tribes, were *to continue and be in force* within the several *reservations* provided for by the treaty. Manifestly if that be true, there could be no sense or purpose in also providing that certain portions of the same laws should be in force in the *reservations* until otherwise provided by Congress.

By the first clause, and without it, all of 2139, 2140 and 2141, including of course the prohibition against the introduction, etc., of liquor in Indian country, would be in force in the reservations, they being Indian country in fact. Therefore the second clause of the Article only applied to the *ceded territory.* On no other theory can it be sensibly construed. It is clear and unambiguous.

It was necessary as to the territory ceded to the United States, because without it, the Indian title being extinguished, the ceded territory would no longer be *Indian country in fact.* The Indian title having been extinguished in the ceded territory, manifestly only one purpose could have actuated the Indians and the United States Government in including the second portion of Article 7 in the Treaty of 1855, namely, for the purpose of protecting, *from the out-*

side, the *reservations*, created by the Treaty of 1855, and the Indians upon them. The situation then, when the Treaty of 1855 was ratified, was (as we have stated), that the first clause of Article 7 (unnecessarily, we think), applied the laws of the United States regulating commerce and intercourse with the Indians to the reservations provided by the Treaty *as long as they were reservations*, viz., Indian country in fact; the second portion of that Article arbitrarily made Indian country out of the property ceded to the United States until otherwise provided by Congress.

The Treaty of 1865 was, as we have stated, between the same three bands of Indians and the United States. It really did not involve the conveyance of anything to the United States by two of the bands. They simply consented to a "deal" between the Mississippi band and the United States. By that "deal" the Mississippi band ceded, absolutely without restriction of any kind, to the United States, the reservations which had been set apart for it in the Treaty of 1855. By that cession those reservations *ceased absolutely to be Indian country in any sense whatever*, and being no longer reservations or Indian Country the first portion of Article 7, of course, no longer applied to them. They became the property of the United States in fee simple. This would seem to be perfectly clear when it is remembered that the second clause of Article 7, which was to remain in force until otherwise provided by Congress, *applied only to the ceded territory*. In consideration of this absolute cession by the Mississippi band to the United States of these reservations, the United States agreed with the three bands of Indians to set apart as the future home of the Mississippi band, so much of a description, indicated on our map as 507, as should not include or interfere with the reservations, 358 and 359, provided by the Treaty of 1855 for the Pillager and Lake Winnebegoshish bands. We contend that

by the Treaty of 1865 reservations 453, 455, 456 and 457 became *wet territory.*

By the Treaty of 1867 the Mississippi band receded 507 to the United States and was given in exchange 509, which was thereafter known as the White Earth Reservation. In 1889, in recognition of the changing status of the Indians involving the dissolution of tribal relationship and the desirability of substituting therefor an independent personal and property status for the Indians (Matter of Heff, 197 U. S., 488; U. S. vs. Celestine, 215 U. S., 278, 290), Congress passed an act, to which reference has already been made, entitled "An Act for the Relief and Civilization of the Chippewa Indians in the State of Minnesota." By this Act the President was authorized and directed to appoint three Commissioners to negotiate with the different bands or tribes of Chippewa Indians in the State of Minnesota for the *complete cession and relinquishment of all their title and interest in and to all their reservations in said State*, except so much of the White Earth and Red Lake Reservations as, in the judgment of the Commissioners, was not required to make the allotments provided for by said Act. It was further provided in and by that Act that "the acceptance and approval of such cession and relinquishment by the President of the United States shall be deemed full and ample proof of the assent of the Indians *and shall operate as a complete extinguishment of the Indian title, without any other or further act or ceremony whatsoever for the purposes and upon the terms in this Act provided.*" It is a fact alleged in the bill and admitted in the answer that the provisions of this Act were carried out in their entirety. The Commissioners appointed, negotiated with the Indians and received from the Chippewa Indians in the State of Minnesota an absolute and unrestricted cession of all their land in the State except a portion of the Red Lake and White Earth Reservations. There are now no *reservations* left in the territory ceded by the

treaty of 1855, and all of the land previously contained in reservations has been ceded to the United States, or allotted to Indians, except about 1,040 acres used by the Government at the White Earth Agency, the Leech Lake Agency, at Bena, and north of Cass Lake.

Pursuant to the Act of 1889 there was conveyed to the United States by the Chippewa Indians, reservations 358 and 359, both within the limits of 507. These two reservations having been set apart for the Pillager and Lake Winnebegoshish bands of Chippewas by the Treaty of 1855, had exactly the same status as the reservations set apart in that treaty for the Mississippi band. The second clause of Article 7 never applied to them, and upon their conveyance in *fee simple* to the United States in 1890, pursuant to the Act of 1889, *all portions of them so conveyed thereby ceased to be Indian reservations or to be Indian country in fact.* They were equally, with the Mississippi reservations ceded to the United States by the Treaty of 1865, *wet territory.* Portions of these two reservations were of course allotted and such of these allotments, as to which the trust period had not expired, remained Indian country within the liquor laws of the United States. There are, however, allotments in these two former reservations which are now *absolute.* They are also *wet country.*

It is alleged in the bill and admitted in the answer that the diminished Red Lake reservation is entirely surrounded by a *wet strip*, the same having been conveyed to the United States in 1890 by the Indians, pursuant to the Act of 1889. Upon this strip are saloons in the closest proximity to the reservation and between the reservation and Bemidji. The entire Act of 1889 recognizes the utter lack of tribal government or titles in land, for the conveyances made pursuant to that Act were made by innumerable individual Indians, including the necessary majorities of the three tribes who were parties to the Treaty of 1855.

Assuming that we have correctly stated the facts and drawn the proper conclusions of law in regard to the status of the territory claimed to be covered by Article 7 of the Treaty of 1855 at the time the acts complained of in the bill occurred, let us now call the court's attention to the absurdity to which it reduces the Government's contention.

The contention of the Government under its heading (3) pages 44–54 of its brief, amounts to this—that Article 7 of the Treaty of 1855 has not expired because there are still Indians, over 7,000 of them, who need protection from over-indulgence in intoxicating liquors. These Indians seem to appeal to the appellants as being essentially tribal Indians, notwithstanding the fact that the reservations within the ceded territory are gone, and there are in existence only several small agencies, which exist for the most part for the purpose of paying the Indians annuities *out of their own money realized from the sale of their own lands*, and notwithstanding the fact that all *actual* tribal existence is at an end (R., 53). The Government would apparently have this court receive the impression that these Indians are protected from the sale of liquor in their vicinity, if only Article 7 of the Treaty of 1855 is declared to be in force. What are the facts in regard to this? The facts are that these Indians are surrounded by territory in which liquor is lawfully obtainable. *The former Mississippi reservations ceded to the United States in 1865 are such territory; so much of the Leech Lake and Lake Winnebegoshish reservations as were conveyed to the United States in 1890 are such territory; every allotment from either of the last two reservations as to which the trust period has expired is such territory; land sold to white men in these two former reservations is such territory; the wet strip admitted to surround the Red Lake reservation is such territory.* Congress must be considered as knowing all this when it enacted the act of 1889. When the cession of 1855 is already dotted with

wet territory how can the Government ask or expect this court to hold that, by an article of a treaty entered into nearly sixty years ago, when the country here involved was a wilderness, *absolute and involuntary prohibition shall be forced upon a white population of over 380,000 people*, and within boundaries containing nearly one-third of the State of Minnesota, having property with an assessed taxable value of over $93,000,000, and filled with thriving cities, towns and villages, and with the railroads, trades, industries and other evidences that show a high state of civilization and development? That Congress never contemplated such a thing is evidenced not only by the Allotment Act of 1887 and the Act of 1889, but by the Act of January 30th, 1897 (29 Statutes, 506), amending Sections 2139, 2140 and 2141 of the Revised Statutes. By this Act allotments during the trust period are made Indian country, showing not only the purpose of Congress to modify the laws in regard to the sale and introduction of liquor in Indian country, so as to harmonize with the changed situation brought about by the Allotment Acts, and provide proper protection for Indians residing upon allotments in an incomplete state, but it clearly shows the understanding by Congress that *such an amendment was necessary*. It is part, and a most significant part, of the entire change in the status of the Indians, and the relation of the United States to them intended by and growing out of the allotment policy. The Government's brief seems to proceed upon the theory that wherever there are Indians whose emancipation is not complete, this court and every one else should be glad to join with it, *at no matter what cost to the surrounding country or white population thereof*, to make it impossible for intoxicating liquor to be where it is humanly possible for them to get it. The idea seems to be that because this is a laudable object all rights must yield to it. It is respectfully submitted that the mere general and laudable desire of the

Government to protect its Indian wards from the ravages of intoxicating liquor, is not a sound basis upon which to work out the respective rights of the State of Minnesota in nearly one-third of its territory, and of 380,000 of its white inhabitants.

A distinction must be made between the relation of guardian and ward as applied to the United States and the Indians, and the existence of actual *tribal relations*. All cases in this court, such as the case of *Tiger vs. Western Investment Co.*, 221 U. S., 286, having to do with any of the Five Nations are not in point here, for the reason that the tribal governments and existence of those tribes or nations has been recognized and continued in force by statute.

In the case of *U. S. vs. Sandoval*, 231 U. S., 28, the Indians there dealt with are stated, in the opinion of the court, to have still owned their land by tribal or communal title. On page 231 of the opinion appears the following :

> " As before stated, whether they are citizens is an open question, and we need not determine it now, because citizenship is not in itself an obstacle to the exercise by Congress of its power to enact laws for the benefit and protection of *tribal Indians* (our italics) as a dependent people. Citing cases."

The first case cited is a case involving one of the Five Nations, and the others have reference to the wardship and not the tribal existence of the Indians involved.

As this court has said, the duration of the existence of the relation of guardian and ward is for Congress to determine, and, notwithstanding the meagre duties of the Chippewa Indian agents still existing in Minnesota, we have no disposition to question that the United States is still exercising certain protective care over the Chippewas as to whose allotments the trust period has not expired, but we contend that by the very

terms of the Act of 1889, which we have quoted, the *Chippewa Indian tribal title to all lands in Minnesota except the portions of the White Earth and Red Lake Reservations excepted by the Act, had at the date of the acts complained of, been absolutely extinguished.*

The question of title must be considered in working out the rights of both parties. The Indian tribal title to lands within the boundaries of the cession of 1855 is absolutely gone. The territory is essentially a territory of white men. Every reasonable effort on the part of the Government to protect the Indians over which its guardianship still exists is an obligation of the highest order, but there is no right or justice in following it to the exclusion of the rights of hundreds of thousands of white inhabitants and citizens of the State of Minnesota, and that is the result asked for by the Government in this case by its attempt to enforce the provisions of Article 7 after allowing them to sleep, with the exception of one prosecution, for over fifty years.

Unless by the language used by this court on page 486 of the case of *Perrin vs. U. S.*, 232 U. S., 478, it was intended to hold that only under the *exact* circumstances stated would a prohibition of this sort be held arbitrary and therefore invalid, it is submitted that this state of facts presents as strong a case for such a holding as is ever likely to come before this court. In the Perrin case the section of territory involved was all reservation and originally contained 400,000 acres. The great bulk of the territory sought to be covered by Article 7 of the Treaty of 1855 has for more than fifty years been non-reservation land, and instead of 400,000 acres it contains over 13,000,000 acres. The land involved in the Perrin case contained 625 square miles, while the land involved here contains over, approximately, 21,540 square miles. While the territory involved is not the entire State of Minnesota, it is equal in area to Massachusetts and Maryland combined.

Conclusion.

It is respectfully submitted that this direct appeal presents no questions of which this court has jurisdiction, and that Article 7 of the Treaty of 1855 was not in force at the time of the acts complained of in the bill, and that the judgment of the District Court should be affirmed.

MARSHALL A. SPOONER,
Attorney for Respondents.

JOHN C. SPOONER,
JOSEPH P. COTTON,
CHARLES P. SPOONER,
Of Counsel.

Key to Map on Opposite Page.

The numbering adopted on the map opposite this Key is the numbering used in indicating the same Indian land cessions upon the maps contained in Part II. of the 18th Annual Report of the Bureau of American Ethnology.

357 (bounded by red border) represents tract of land ceded by the Mississippi, Pillager and Lake Winnebegoshish bands of Indians to the United States under the Treaty of February 22nd, 1855 (10 Stat., 1165).

453, 455, 456 and 457 represent reservations provided by the Treaty of 1855 for the Mississippi band and ceded to the United States by that band pursuant to Treaty of March 20th, 1865 (13 Stat., 693).

358 and 359 represent the reservations reserved for the Pillager and Lake Winnebegoshish bands by the Treaty of 1855, the title to which was conveyed to the United States by the Indians pursuant to the Act of January 14th, 1889 (25 Stat., 642).

507 (bounded by blue border) represents tracts set aside as home for the Mississippi band under Treaty of 1865, *supra*, and re-ceded to the United States by that band under the Treaty of March 19th, 1867 (16 Stat., 719).

509 (bounded by blue border) represents land set apart for the Mississippi band by Treaty of 1867, *supra*, in exchange for 507.

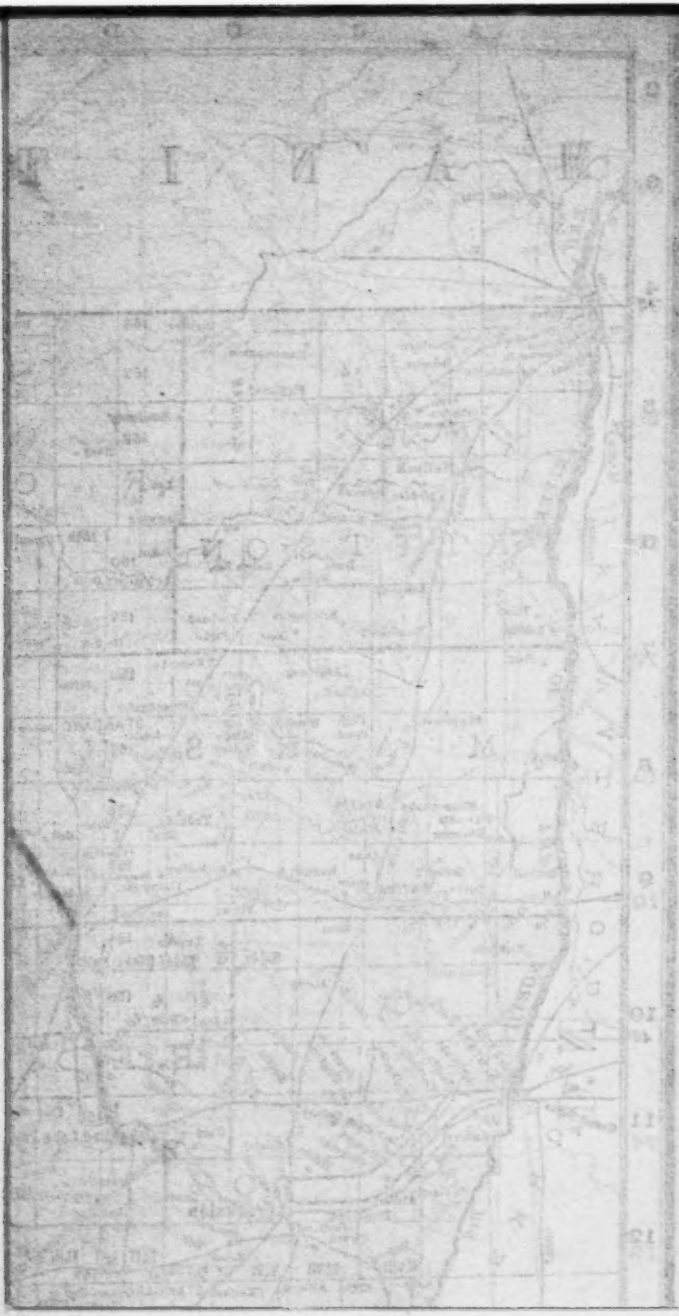
MAPS

TOO

LARGE

FOR

FILMING



[11424]

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

W. E. JOHNSON, T. E. BRENTS, AND H. F. Coggeshall, appellants,
v.
EDWIN GEARLDS, L. J. KRAMMER, FRED E. Brinkman, et al.
} No. 802.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

REPLY BRIEF FOR THE APPELLANTS.

CORRECTED STATEMENT.

Counsel attach to their brief a map whereon they show (by Nos. 358 and 359) two tracts which they say were the lands reserved by the treaty of 1855 as homes for the Pillager and Lake Winnibigoshish Bands. In fact, there were three tracts so set apart by Article II of that treaty. (10 Stat., 1166.) The third, not shown on their map, was, in the northern part of tract "C" on our map—507 of their map—nearer Bemidji than Nos. 358, 359, and is numbered 360. They further assert that the new home set

apart for the Mississippi Tribe by the treaty of 1865 was all of C or 507, save 358 and 359. This is wrong. No. 360 was also excepted, or else it was the sole exception, dependent on what was meant by the words "the third clause of Article II" in the treaty of 1865.

They further say "four tracts set apart for the Mississippi Band by the treaty of 1855 were surrendered by the treaty of 1865"; in fact, seven tracts were so set apart, six for the tribe and one for an individual Indian. All six were surrendered, and one of these—"the Mille Lac"—lay *outside* of A or 357, and is numbered 354.

They also state that 509 was the final reservation made by the treaty of 1867. This is wrong. There was also an area (in 507 or C) numbered 508, lying between 358 and 359 on their map. In other words, they did not re-cede the whole of 507 (as stated in their brief, p. 5).

These errors of counsel explain their inability to understand why the Pillager and Lake Winnibigoshish joined in the treaty of 1865 (their brief, p. 38). Their consent was necessary to a surrender of the Mille Lac tract, which lay *outside* of A or 357, and was not included in the cession of 1855.

JURISDICTION.

Construction or validity of Article VII.—Respondents deny that the construction of Article VII of treaty of 1855 is involved, and yet most of their brief is devoted to the contention that the words

"the country herein ceded" do not mean "*reservations,*" while we contend that the words "*within the entire boundaries of the country herein ceded*" include and mean everything with the exterior boundaries delimited by Article I of that treaty. And counsel state their contention in a parenthetical assertion on page 17 of their brief thus, "(which of course excludes the reservations provided for by the treaty)."

Counsel do not refer to the analysis of the meaning of the word "validity" made by Chief Justice Jay of this court in *Jones* v. *Walker* (our brief, p. 18). Nor does their passing reference (their brief, p. 18) to *U. S.* v. *Wright* dispose of the application of the decision to this case (our brief, pp. 16, 17). Note in this connection that the court below is quoted (their brief, p. 27) as saying that the question before it "is a question whether that provision in the treaty of 1855 is still in force, or whether any subsequent act of Congress has modified or repealed it," and the statement of the court that "a treaty may supersede a prior act of Congress." *Fong Yue Ting* v. *U. S.*, 149 U. S., 698, quoted by lower court. (R., 33.) Equally may a treaty supersede a prior treaty. If validity does not include continued or present existence, we should have one circuit court of appeals holding a given treaty was presently existing and another holding it was not. The appellate jurisdiction of the court is aimed at speedily securing uniformity of rule on all such matters throughout all Federal territory. In view of the foregoing, it

would not be profitable to follow counsel through their labored analysis (their brief, 19–24) of cases cited by this court in the *Champion Lumber Co. Case* (227 U. S., 451).

Construction or application of Constitution as between the police power of the State and the full control of Congress over Indian affairs.—Here the lower court stated its view of what was drawn in question, as follows (R., 38):

> The question is where is the *power to regulate?* etc. (For full quotation see p. 23, our original brief).

A reference to the *Heff case* (197 U. S., 488, 505, 506), here cited by the court below, shows the court was speaking of constitutional powers.

See also *Dick* v. *U. S.*, 208 U. S., 353

Construction of treaty of 1865, 1867.—The fact that the court's opinion was pronounced on the original demurrer becomes of no importance in view of the concession of the counsel (their brief, p. 16) that this court has jurisdiction, if a jurisdictional question appears from the record, though not passed on by the court below. This also disposes of the suggestion in the first paragraph, page 28, of their brief. As to the second paragraph (p. 28) we grant that the references in the pleadings are mere conclusions of law. They show, however, that the pleader deemed these questions of law were involved; and even invited them, by going so far as to improperly plead legal contentions.

On page 34 of their brief, counsel, when arguing the merits, say:

> We do maintain that a treaty * * * can *modify* or repeal a prior treaty between the same parties.

They thereby indicate a belief that the construction of these later treaties is *still* "drawn in question."

MERITS.

I. Effect of Enabling Act on Article VII.

Respondents say (their brief, 29) it operated to repeal the article because by silence it shows a purpose not to exercise that reserved power in Minnesota after admission. This feature is covered by our original brief. It may be noted that since the opinion of the court below in this case, (at which time the latest case brought to its attention was the Sutton case, 215 U. S., 291) a number of cases have been decided bearing upon the force of the general language of the equal admission clause. These cases are referred to in our original brief. It should be noted that the case of *United States* v. *Donnelly*, 228 U. S., *243, 271*, involved the enabling act of California, in terms like that of Minnesota; and of course the *"43 Gallons" case*, 93 U. S., *188*, involved the very same enabling act; and the decision of this court in the *Dick case*, 208 U. S., 355, stating the contention in the *"43 Gallons" case*, shows that the same point was urged and overruled in the later case.

Respondent also insists that the second clause of Article VII was neither "natural" nor "normal,"

and, therefore, unreasonable, because it applied prohibition to 13,000,000 acres. Why argue to this effect when the very same prohibition existed in the same area the day before the treaty by force of the reservation, and had so existed for years? The treaty itself was a declaration both by the Indians and Congress that the continuance of the prohibition was then natural, normal, and necessary, though it recognized that in future it might become otherwise, and gave Congress power to change it as conditions might demand. The very quotation of counsel (their brief, 31) from *Bates* v. *Clark* recognizes the propriety of such a prohibition. Speaking of this quotation in the *Dick case*, 208 U. S., 358, this court said:

> "But it took care to add the qualifying words —" (then follows the last clause of their quotation from the Bates case).

Counsel challenge the Government to cite an instance where so large an area was made artificial Indian country at the incoming of any State. The qualification of the word "artificial" relieves them of many instances of greater dry territory in actual reservation form. It would not be profitable to attempt comparisons in view of the difference in the period of admission, the extent of local development, the number of Indians and the extent of reservations from time to time in different States. We content ourselves with instancing the *"43 Gallons"* case where the condition was more extreme—immediately adjoining the ceded strip here in question.

The area ceded by the treaty of 1863, there involved, was approximately 4,000,000 acres. The report of the Indian Commissioner for 1912 (p. 87) shows that there were 1,436 Indians of the Red Lake and Pembina bands who made the treaty of 1863, against 7,473 Indians in the case at bar. Assuming this proportion was constant and existed at the time of the treaties and reducing the acreage at bar to the proportion demanded on the basis of the *"43 Gallons"* case, it would represent a little over 2½ million acres against 4 million in that case; or increasing the *"43 Gallons"* case acreage in the same proportion, there was protection there in area corresponding to what it would be if 20 million acres were set aside here.

The language of Article VII of the treaty in the *"43 Gallons"* case was similar, as the court below here said (R., p. 25) to that of the second clause of the article in the case at bar. And this court said of it:

> This stipulation was not only *reasonable* in itself, but was justly due from a strong government to a weak people it has engaged to protect.

II. The effect of the later treaties.

Respondents insist (their brief 33–34) that we misconceive their contention, and then advance a contention nowhere disclosed in the record. It would be strange if we had anticipated it. They insist that the first clause of the Article VII is limited to the reservations created by Article II of the treaty of 1855. (This we agree to.) They then insist that

the second clause of Article VII does not cover all the land within the ceded boundaries prescribed by Article I, but only so much within those boundaries as remains after excluding the tracts set apart by Article II. This we dispute.

The question presented involves the construction of the words "shall *continue* and be in force *within the entire boundaries of the country herein ceded,*" in the second clause of Article VII. The boundaries of the country ceded enclose a single entire tract; and the language of Article I is "*cede*, sell, and convey * * * all our right, title, and interest in and to *the lands* * * * *included within the following boundaries.*" (These boundaries correspond with the red lines on each map.)

Article II reads:

> There shall be, and hereby is, reserved and set apart a sufficient quantity of lands for the permanent homes of said Indians, the lands so reserved and set apart to be in separate tracts as follows [then are described seven different tracts for the Mississippi Band, the first of which is entirely *outside* the ceded boundaries and is *not shown* on respondent's map].

We submit:

(1) This contention is purely academic. Bemidji is not located within any of the tracts set apart by the treaty of 1855; so that whichever meaning be given the second clause of Article VII it reaches out to that town. Thus the argument must proceed as in our original brief (pp. 40–44), which answers

the contention of the pleader who drafted the bill of complaint (for record references see our original brief, p. 25). This argument respondents do not attempt to meet in the brief here filed.

(2) That as Article VII contrasts "reservations" in the first clause against "entire boundaries of the ceded country" in the second clause; and, especially as one reservation lay outside of the ceded boundaries, they were purposely contrasted: (*a*) to make the "trade" and "intercourse" laws reach the outside or "Mille Lac" tract; (*b*) to make these laws generally endure only so long as the reservations endured; and (*c*), as to the liquor laws, to apply them to the *whole* bounded area without regard to whether it should thereafter be reservation or not, in order to protect the solid block against interior storehouses for liquor. The "Mille Lac" piece, being well outside, did not need the protection when it ceased to be a reservation.

(3) Respondent would interpret the clause as if it read "within the entire boundaries of the country herein ceded (excepting the six tracts reserved for homes within the ceded boundaries)." There is no justification for inserting such additional language in the act. To do so would destroy its usefulness as is apparent from the consequences developed from this contention by counsel themselves (their brief, 41, foot). It would lessen the ultimate protection to the Indians in the very areas made their home, and because 3 separate tracts were given to the Pillager and Lake Winnibigoshish Indians which they might

from time to time independently surrender, it would leave storehouses for liquor within the very boundaries of the new reservation created by the treaty of 1865; and by the surrender then made of the old Mississippi reservations, there would have been left a storehouse for liquor at the very boundary of the new reservation "C" on its eastern side, and another but fifteen miles away.

(4) Article I of the treaty of 1863 (the "*43 Gallons*" case) corresponds in its language to Article I of the treaty of 1855, with like single entire outer boundaries. There were no tracts reserved within the ceded area. The language of Article VII in the treaty of 1863 is "throughout the country hereby ceded." Manifestly, the language "hereby ceded" as there used must relate only to the tract bounded in Article I. The same rule should here obtain, we insist, even if the same general language had been used in Article VII of each treaty. But out of abundant caution, because some tracts within the outer boundaries were being set apart, the framers of the treaty used the words "*continue and be in force within* the *entire boundaries*" in addition to the words "of the country hereby ceded."

(5) Article I uses the word "*cede,*" and then in identifying what is ceded describes a *single entire tract* by entire outer boundaries only. This should determine the matter. Also the word "continue" carries the idea that the prohibition should remain as it before was within the entire boundaries i. e. total—not spotted prohibition.

Counsel insist (their brief, 38–39) that by the treaty of 1865 the separate tracts then receded to the United States (within "A" of our map, or "357" of theirs) became by such recession "wet" territory. This is a mere consequence of their contention that the second clause of Article VII did not apply to the tracts set apart by Article II of the treaty of 1855. We have pointed out that it would leave a storehouse for liquor abutting the very boundary of the newly created reservation "C" and would leave from one to three potential storehouses inside the new reservation "C" itself. (Tracts 358, 359 of their map, and 360, not shown on their map.) It would also leave the "507" which is a part of the cession of 1863 ("43 Gallons" case) "wet" whenever it should be surrendered after 1865 by the Mississippi Band, as such later surrender by their theory would wipe out Article VII of the treaty of 1863 as applied to that area, and would thus leave that part of "507," as a liquor storehouse bordering on the last reservation (their map 509) created by the treaty of 1867. The general result would be that inside and to the north of the Leech Lake Reservation (with its five thousand odd Indians) you would have storehouses for liquor and many storehouses elsewhere in perilous proximity to the other reservations. On the other hand as the Government interprets the second clause of the treaty of 1855, all would have been "dry" territory continuously, and the enforcement of the treaty would have protected the Indians as needed. No better illustration of the error in interpreting the sec-

ond clause of Article VII as counsel would interpret it can be found than the very results disclosed by them in their brief (p. 41). The first four conditions recited would be possible only under their interpretation; and the fifth, the wet strip around Red Lake, never was protected at any time by any treaty.

Counsel list these conditions to indicate that we are giving the court a false impression as to the protective influence of Article VII, and possibly to show the unreasonableness of continuing it in force. We insist that Article VII, as we interpret the second clause, is protective; and if it is not under their interpretation such interpretation should not be adopted. This court, in *Lau Ow Bew* v. *U. S.*, 149 U. S., 59, said:

> Nothing is better settled than that statutes should receive a sensible construction such as will effectuate the legislative intention and if possible, so as to avoid an injust or absurd construction. (*United States* v. *Gue Lin*, 176 U. S., 467.)

At this point because counsel insist that the last-named Red Lake wet-strip makes it idle to enforce Article VII, it will be noticed that the same strip, in practically the same depth, lay between the tract ceded by the treaty of 1863 and the Red Lake Reservation, to which the Pilliger and Pembinas then moved (see our map). None the less, this court in the *"43 Gallons"* case upheld the treaty provision.

III. The effect of act of January 14, 1889 (25 Stat., 642), and subsequent change of conditions.

Counsel next insist (their brief 39) that by the act of 1889, *supra* (25 Stat., 642), all Indian titles were extinguished. Later (p. 44) they state the true situation in this regard, viz, that lands of the Red Lake and White Earth Reservations, not required for allotments by the terms of the act, remained tribal lands (unaffected thereby). Then they insist (39–40) that by this act of 1889 and subsequent alleged deeds thereunder, in 1890, the Pilliger and Lake Winnibigoshish tracts (Nos. 358 and 359 on their map) became wet. This is, in turn, a result of their contention as to the force of the second clause of Article VII. (It may be noted that documents of the Indian Bureau show these reservations as in existence and enlarged by Executive order as late as 1897, and possibly since.) On page 37 of their brief counsel say that there could have been no purpose in also providing that the liquor laws, themselves a part of the general trade and intercourse laws, should be in force on the same reservations, suggesting that the matter was already covered by the first clause. But their very contention shows that the first clause is operative only so long as the reservations endure, while the second clause would protect the lands regardless of their status as reservations or otherwise.

They then suggest (their brief, 42) that the amendment of January 30, 1897 (29 Stat., 506), the general liquor prohibition law, shows that "such an amendment was necessary." We agree. But we say that

the amendment was a general law and would operate in many cases where there was no treaty provision continuing the prohibition, to prevent the allotments from becoming spotted storehouses for liquor. They assert (p. 44, their brief) that the question of the present existence of tribal lands is the large test. We say that it is but one of the tests and a minor one, the essential being the personal need of the Indian wards. They admit that wardship still obtains (their brief, pp. 43). This court in the *Perrin* case shows that from the standpoint of the need of the Indian three features, at least, should be considered. It says:

> The trust period has not expired, the tribal relation has not been dissolved, and the wardship of the Indians has not been terminated. *United States* v. *Perrin*, 232 U. S., 487.

Each feature is presented in the case at bar. Respondent also admits that tribal title still endures to those portions of the White Earth and Red Lake Reservations, excepted from the operation of the act of 1889; and nearly 40,000 acres in the former reservation remained unallotted at the time of the acts here complained of. (Report of Commissioner of Indian Affairs, 1912, p. 102.) They still have and draw their tribal moneys, therefore tribal relation must continue.

As our map shows Bemidji is closer to the Red Lake, Leech Lake, and White Earth Reservations than is Crookston to any of the three, or to any reservation, and there is no part of the ceded area of 1855 that

is not to-day nearer one of these three reservations than were the extreme portions of area "D" (ceded under the treaty of 1863) to the Red Lake and White Earth Reservations, and yet that whole area was held a reasonable and necessary protection in 1876 in the *"43 Gallons"* case.

If the increased number and appetites of the whites are to be the test, apparently the need for wet territory is great. But the whites came into this territory with the knowledge that the Indian needs were paramount; and that it could be kept dry whenever, and so long as, the interests of the Indians required. They have gained and enjoyed greater privileges by the voluntary Indian cessions; and may not use them to built up equities in themselves against the need of protection to the Indians. Viewed from any angle affecting the Indians, the need for protection would seem to be as great as it was in 1876 when the *"43 Gallons"* case was decided. And at least, it can not be said that Congress acted arbitrarily in 1911, in refusing to adopt President Taft's recommendation as to diminishing the dry area in the cession of 1855. The various features of the need for protection, as it existed at the time of the acts complained of are treated of in the original brief.

Counsel (their brief, p. 35) criticises our reference to the condition of the Indians as disclosed by the 1912 report of the Indian Commissioner, because the facts there detailed are not in the record in this case. We viewed it as a report of an executive department of the Government which this court would judicially

notice, and refer the court to a recent case in which it has so noticed and used such reports (*Donnelly* v. *United States*, 228 U. S., 256–257).

CONCLUSION.

This case involves the enforcement of Article VII of the treaty only as to the town of Bemidji. No question here arises as to its enforcement in any other portion of the ceded area. We submit that the showing here made does not demand or warrant a judicial declaration that the need for protection at this point, midway between the three reservations, is so lacking as that the attempted enforcement of the article there by the Department of the Interior was an arbitrary act. Rather should it be said that the question, as applied to Bemidji is still a legislative one and the showing here made should have been submitted by respondents to Congress for its discretionary action, under the last clause of Article VII.

WM. WALLACE, JR.,
Assistant Attorney General.

APRIL, 1914.

○

JOHNSON *v.* GEARLDS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

No. 802. Argued May 1, 1914.—Decided June 8, 1914.

Where complainant's entire case rests on the construction of treaties with Indians in regard to reservations and on the claim that certain of such treaties have been repealed by the subsequent admission of the Territory within which the reservations are situated, this court has jurisdiction of a direct appeal from the District Court under § 238, Judicial Code.

The provision in Article VII of the treaty with the Minnesota Chippewa Indians of 1855, that the laws of Congress prohibiting the manufacture and introduction of liquor in Indian country shall be in force within the entire boundaries of the country ceded by that treaty to the United States until otherwise provided by Congress, relates to the outer boundaries and includes all the reservations that lie within.

It is within the constitutional power of Congress to prohibit the manufacture, introduction or sale of intoxicants upon Indian lands, including not only land reserved for their special occupancy, but also lands outside of the reservations to which they may naturally resort; and this prohibition may extend even with respect to lands lying within the bounds of States.

Article VII of the Chippewa treaty of 1855 was not repealed directly or by implication by the subsequent act of Congress admitting Minnesota into the Union, nor was that article repealed by the effect of the subsequent treaties with the same bands of Chippewas of 1865 and 1867; but the intent of treaties of 1855, 1865 and 1867, as construed

together, was that the acts of Congress relating to the introduction and sale of liquor in Indian country should continue in force within the entire boundaries of the country in question until otherwise provided by Congress.

Article VII of the Chippewa Treaty of 1855 has not been superseded by any of the provisions of the Nelson Act of 1889, or the cessions made by the Indians to the United States pursuant thereto; nor has that article been superseded by reason of any change in the character of the Territory affected by the treaty and the status of the Indians therein.

The abrogation of an article in an Indian treaty prohibiting the sale of liquor within territory specified therein until Congress otherwise provides is, in the absence of any considerable number of Indians remaining in that territory, a question primarily for Congress and not for the courts.

The fact that there has been a recent communication and recommendation from the President to Congress on a particular subject and Congress has not acted thereon is evidence that the problem is not so entirely obvious of solution that the courts can declare it to be beyond the range of legislative discretion.

Article VII of the Chippewa Treaty of 1855 having provided for the prohibition against sale of liquor within the entire territory ceded by that treaty until Congress should otherwise provide, *held* that notwithstanding the subsequent admission of Minnesota to the Union, and the later treaties with the Chippewas of 1865 and 1867 and the changed condition of the country and the status of the Indians, Congress not having otherwise provided, the prohibition is still in force throughout that entire territory including the City of Bemidji in which there are but few Indians and in the vicinity of which there is a large area of territory unrestricted by the prohibitions of Article VII.

183 Fed. Rep. 611, reversed.

THIS is a direct appeal from a final decree of the District Court, rendered April 20, 1912, granting to appellees (who were complainants below, and will be so designated), a permanent injunction against appellants (defendants below), in accordance with the prayer of the amended bill of complaint. It appears that complainants are severally residents and citizens of the City of Bemidji, Beltrami County, Minnesota, and at the time of the filing of the

bill were, and for a considerable time had been, engaged in business there as saloon-keepers, selling at retail spirituous, vinous and malt liquors at their respective places of business in that city, each of them having paid to the Federal and state governments respectively, the necessary tax and license fees, and having a receipt from the Federal Government and a liquor license issued under the authority of the State of Minnesota by the municipal council and officials of the city. The bill alleged that each of the complainants had refrained from selling or disposing of any liquor to Indians, or individuals of Indian blood, and had complied with the Federal and state laws in this and in other respects; that each of them had built up and established a profitable and lucrative trade; and that the jurisdictional amount was involved. It averred that defendants, being citizens of other States, and acting in conjunction as special officers under the Interior Department of the United States Government, were threatening to enforce within the City of Bemidji the provisions of §§ 2139 and 2140 of the Revised Statutes of the United States and amendments thereto, and on December 9, 1910, had ordered complainants and other licensed saloon-keepers in Bemidji to close their saloons and cease sales of liquor, and ship away their stock, threatening that otherwise they would destroy the stocks of liquor in the possession of complainants, on the ground that under Article VII of a treaty made on the twenty-second day of February, 1855, between the United States and certain bands of Chippewa Indians, certain territory mentioned in the treaty, including what is now the City of Bemidji, was subject to the laws of the United States respecting the sale of liquors in the Indian country.

To the bill as orginally filed defendants interposed a demurrer, which was overruled, and a temporary injunction was granted. 183 Fed. Rep. 611. Thereafter, the cause was brought to final hearing upon an amended bill

and a reamended answer, and the court, adhering to its former conclusion, rendered a final decree, as already mentioned.

The pertinent historical facts, as deduced from the averments of the amended pleadings, are as follows: On and prior to February 22, 1855, certain bands of the Chippewa Tribe of Indians, known as the Mississippi bands and the Pillager and Lake Winnibigoshish bands, were in possession of the greater portion of the lands north of parallel 46, within the boundaries of the then Territory of Minnesota. Their country constituted a wilderness, almost wholly uninhabited by civilized people. On the date mentioned, these bands entered into a treaty with the United States, which was approved by the Senate and proclaimed by the President shortly thereafter (10 Stat. 1165). By its first article the Indians ceded and conveyed to the United States "all their right, title, and interest in, and to, the lands now owned and claimed by them, in the Territory of Minnesota, and included within the following boundaries:" [Here follows a particular description, by natural boundaries, of a tract of country said to contain about 21,000 square miles.] By the same Article the Indians further relinquished and conveyed to the United States any and all right, title, and interest, of whatsoever nature, that they then had in and to any other lands in the Territory of Minnesota or elsewhere. This Article mentions no exception or reservation from the lands ceded or granted. By Article II there was "reserved and set apart, a sufficient quantity of land for the permanent homes of the said Indians: the lands so reserved and set apart to be in separate tracts, as follows." The separate tracts were then briefly described or indicated. For the Mississippi bands seven reservations were set apart, which came to be known as the Mille Lac, Rabbit Lake, Gull Lake, Pokagomon Lake, Sandy Lake, and Rice Lake reservations; and besides these, a section of land was

reserved for one of the Indian chiefs. For the Pillager and Lake Winnibigoshish bands, three reservations were set apart, known from their respective locations as the Leech Lake, Lake Winnibigoshish, and Cass Lake reservations.

The seventh Article of the treaty is as follows:

"Article VII. The laws which have been or may be enacted by Congress, regulating trade and intercourse with the Indian tribes, to continue and be in force within and upon the several reservations provided for herein; and those portions of said laws which prohibit the introduction, manufacture, use of, and traffic in, ardent spirits, wines, or other liquors, in the Indian country, shall continue and be in force, within the entire boundaries of the country herein ceded to the United States, until otherwise provided by Congress."

By act of February 26, 1857, c. 60, 11 Stat. 166, the inhabitants of a portion of the Territory, including the lands ceded by the Chippewas as above, were authorized to form a state government and come into the Union on an equal footing with the original States. The act contained no condition with reference to the Treaty of 1855 or the rights of the Indians to any lands within the boundaries of the State. A state constitution was formed, by which Indians were given the right to vote under certain circumstances, and persons residing on Indian lands were declared entitled to enjoy the rights and privileges of citizens as though they lived in any other portion of the State, and to be subject to taxation. This constitution having been ratified and adopted by the people, Congress, by act of May 11, 1858, c. 31, 11 Stat. 285, admitted the State "on an equal footing with the original States in all respects whatever." And by § 3 it was enacted that all the laws of the United States, not locally inapplicable, should have the same force and effect within that State as in other States of the Union.

Another treaty was made between the Mississippi, Pillager, and Lake Winnibigoshish bands of Chippewas and the United States under date May 7, 1864, which was ratified and proclaimed in the following year and is known as the Treaty of 1865 (13 Stat. 693). It took the place of a treaty of March 11, 1863 (12 Stat. 1249). By its first section the Gull Lake, Mille Lac, Sandy Lake, Rabbit Lake, Pokagomon Lake, and Rice Lake reservations as described in the Treaty of 1855, were ceded to the United States, with an exception not now pertinent; and in consideration of this cession, the United States agreed to set apart for the future home of the Chippewas of the Mississippi a considerable tract of land (part of the great tract ceded in 1855), embraced within designated boundaries, expressly excepting however the reservations made in the Treaty of 1855 for the Pillager and Lake Winnibigoshish bands, which were included within the boundaries mentioned. The lands thus set apart for the Chippewas of the Mississippi contained all the territory now within the limits of the City of Bemidji and the lands adjacent to it for a distance of several miles in all directions.

By a treaty made between the United States and the Chippewas of the Mississippi dated March 19, 1867, ratified and proclaimed in the same year (16 Stat. 719), these bands ceded to the United States the greater portion (estimated at 2,000,000 acres) of the lands secured to them by the treaty of 1865, and in consideration of this cession, the United States set apart for the use of the same Indians a tract to be located in a square form as nearly as possible, with lines corresponding to the Government surveys, the reservation to include White Earth Lake and Rice Lake, and to contain thirty-six townships. This reservation came to be known as the White Earth Reservation. It lies within the exterior boundaries of the cession of 1855.

The territory ceded to the United States by the treaty

of 1867 contains what is now the City of Bemidji and the country about it for miles in every direction.

By an act of January 14, 1889, known as the Nelson Act, c. 24, 25 Stat. 642, the President was authorized to designate Commissioners to negotiate with all the different bands of Chippewa Indians in Minnesota for the complete cession and relinquishment of their title and interest in all their reservations, except the White Earth and Red Lake Reservations, and in so much of these two reservations as in the judgment of the Commission was not required to make and fill the allotments required by this and existing acts. The act provided that a census should be taken, and that after the cession and relinquishment had been approved, all the Chippewa Indians in the State, except those on the Red Lake Reservation, should be removed to the White Earth Reservation, and lands should then be allotted to the Indians in severalty, in conformity with the act of February 8, 1887, c. 119, 24 Stat. 388, and the surplus lands disposed of by sale, and the proceeds placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, to bear interest payable annually for fifty years, and at the end of that period the fund to be divided and paid to all of said Chippewas, and their issue then living, in cash. By the first section of this act the acceptance and approval of the cession and relinquishment of the lands by the President of the United States was to be deemed full and ample proof of the assent of the Indians, and to operate as a complete extinguishment of the Indian title without further act or ceremony. Commissioners were appointed accordingly, and agreements were entered into between them and the several bands of Chippewas, by which the Indians accepted and ratified the provisions of the act and ceded to the United States all their right, title, and interest in their reservations, excepting portions of

the White Earth and Red Lake Reservations, and these cessions were approved by the President on the fourth day of March, 1890.

Since the making of the Treaty of 1855 the country then ceded to the United States, with the exception of the portions set apart as Indian reservations, has been largely developed, gradually at first, but with great rapidity during recent years, and all the land has become populated by white people and opened up to settlement and organized as political subdivisions of the State, and in the larger portion of the territory industries have been established and commercial interests have grown up, so as to materially change the situation that existed at the time of the making of the treaty. According to the census of 1910, the counties affected by that treaty show a total white population of 382,191. Bemidji is the county seat of Beltrami County, and is a municipal corporation, organized under the laws of the State as a city, containing within its corporate limits about 7,000 inhabitants, and, in connection with adjacent municipalities, constituting a population of about 9,000 people. The city is reached by five lines of railroads, three of which have transcontinental connections. The country surrounding it is highly developed, and there are no Indian habitations within twenty miles in any direction from the city.

The original Red Lake Indian Reservation lay immediately north of the great tract covered by the cession of 1855, and was not subject to the treaty of that year. Pursuant to the Nelson Act of January 14, 1889, a considerable portion of this reservation was relinquished to the United States, and has been opened up to settlement, with the result that there is now a strip of territory about fifteen miles in width, lying a few miles north of Bemidji, which is admittedly exempt from the provisions of any treaty or law relative to the introduction of intoxicating liquors in the Indian country; and in that strip the sale of intoxi-

cating liquors is actually conducted without interference on the part of the Government of the United States.

Mr. Assistant Attorney General Wallace for appellants:

This court has jurisdiction under § 238, Judicial Code, because the construction or validity of Article VII of the Treaty of 1855 is drawn in question; the construction or application of the Constitution is involved; the construction of Treaties of 1865 and 1867 is drawn in question. *United States* v. *Wright*, 229 U. S. 226. "Validity" involves existence of treaty. The Minnesota Enabling Act did not expressly repeal Article VII.

The question of implied repeal depends on the relative potency of state police power and the Federal interstate commerce power.

The court below erred in holding that the state police power was dominant.

Article VII of the treaty was in force in 1910.

It was not repealed by the Minnesota Enabling Act.

Webb Case, 225 U. S. 663, and *Wright Case*, 229 U. S. 226, control this case.

The *Perrin*, *Dick*, and *Whisky Cases* are like the case at bar, except that Congress acted here before, and there after, Statehood.

If Congress still had power after Statehood, implied repeal by Enabling Act is not possible.

A reservation of power in Enabling Act is not necessary.

Congress could not reserve a power it might not enjoy without reservation.

The State has no police power over Indian commerce.

The *McBratney* and *Draper Cases* are distinguished in the *Donnelly Case*, and *Ward* v. *Race Horse*, 163 U. S. 504, is distinguished.

The *Friedman Case* was overruled by the Circuit Court of Appeals in 180 Fed. Rep. 1006.

Article VII was not repealed by Treaties of 1865 or 1867, and there has been no express repeal.

It was not necessary to repeat prohibition in 1865 or 1867 because Article VII in the 1855 treaty covered and protected the whole area.

The need for protection of Article VII, was as great in 1865 and 1867 as in 1855.

The rule that reconveyance to a grantor cancels existing covenant is not applicable in this case, because there has been no such reconveyance in fact and because that rule does not apply to treaties.

Article VII had not become a purely arbitrary regulation in 1910.

Three classes of Indians are concerned: full-blood White Earth and all Leech Lake allottees holding prior to act of May 9, 1906. These may be citizens but cannot alienate lands.

All of the above are holding allotments only since the act of 1906. These are not citizens and cannot alienate.

Mixed-blood White Earth allottees are citizens of the United States and of the State.

All save class 3 are still in wardship (without regard to other reasons), because the trust period has not expired.

The wardship of mixed blood White Earth allottees depends on whether they are still regarded as a dependent people by the executive and legislative branches of the Government.

The pleadings do not show that this protection is purely arbitrary as applied to tract A.

The open 15-mile strip never was protected by treaty.

There is present need of 10,000 Indians for this protection, and there is inadequacy of state laws to keep the liquor out.

In support of these contentions, see *Altman & Co.* v. *United States*, 224 U. S. 583; *The Cherokee Tobacco*, 11 Wall. 616; *Champion Lumber Co.* v. *Fisher*, 227 U. S. 445,

451; *Cornell* v. *Green*, 163 U. S. 75; *Couture* v. *United States*, 207 U. S. 581; *Coyle* v. *Oklahoma*, 221 U. S. 559; *Dick* v. *United States*, 208 U. S. 340; *Donnelly* v. *United States*, 228 U. S. 243; *Draper* v. *United States*, 164 U. S. 240, 247; *Ex parte Webb*, 225 U. S. 663; *Foster* v. *Neilson*, 2 Pet. 314; *Friedman* v. *United States Exp. Co.*, 180 Fed. Rep. 1006; *Georgia Rd. &c. Co.* v. *Walker*, 87 Georgia, 204; *Green* v. *Edwards*, 15 Tex. Civ. App. 382; *Holder* v. *Aultman*, 169 U. S. 81; *Hallowell* v. *United States*, 221 U. S. 312; *Jones* v. *Walker*, 2 Paine, 288; *Loeb* v. *Township*, 179 U. S. 472; *Matter of Heff*, 197 U. S. 488; *Matter of Rickert*, 188 U. S. 432; *McKay* v. *Kalyton*, 204 U. S. 458, 466; *Mosier* v. *United States*, 198 Fed. Rep. 54; *Muse* v. *Arlington Hotel Co.*, 168 U. S. 435; *People's Bank* v. *Gibson*, 161 Fed. Rep. 286, 291; *Perrin* v. *United States*, 232 U. S. 478; *Petit* v. *Walshe*, 194 U. S. 216; *Pollard* v. *Hagan*, 3 How. 212; *Silverman* v. *Loomis*, 104 Illinois, 142; *Tiger* v. *Western Invest. Co.*, 221 U. S. 286; *United States* v. *Celestine*, 215 U. S. 287; *United States* v. *Holliday*, 3 Wall. 407; *United States* v. *McBratney*, 104 U. S. 621; *United States* v. *Pelican*, 232 U. S. 442; *United States* v. *Sandoval*, 231 U. S. 28; *United States* v. *Sutton*, 215 U. S. 291; *United States* v. *Wright*, 229 U. S. 226; *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188; *United States Exp. Co.* v. *Friedman*, 191 Fed. Rep. 673; *Ward* v. *Race Horse*, 163 U. S. 504; *Wilson* v. *Shaw*, 204 U. S. 24, 33.

Mr. Charles P. Spooner, with whom *Mr. Marshall A. Spooner*, *Mr. John C. Spooner*, *Mr. Fred W. Zollman* and *Mr. Joseph P. Cotton*, were on the brief, for appellees:

This court has not jurisdiction of this appeal under § 238, Judicial Code, because the construction or validity of Article VII of the treaty of 1855 is not drawn in question; the construction or application of the Constitution is not involved; the construction of the treaties of 1865 and 1867 is not drawn in question.

Article VII of the treaty of 1855 was repealed by the Minnesota Enabling Act; it was also repealed by the treaties of 1865 and 1867; and it had expired in 1910 because of the act of January 14, 1889, and the change in the character of territory and the status of Indians.

In support of these contentions, see *Bates* v. *Clark*, 95 U. S. 204; *Balt. & Poto. R. R. Co.* v. *Hopkins*, 130 U. S. 210; *Champion Lumber Co.* v. *Fisher*, 227 U. S. 445; *Clough* v. *Curtis*, 134 U. S. 361; *Hamilton* v. *Rathbone*, 175 U. S. 414; *Linford* v. *Ellison*, 155 U. S. 503; *Matter of Heff*, 197 U. S. 488; *McLean* v. *Railroad Co.*, 203 U. S. 38; *Miller* v. *Cornwall R. R. Co.*, 168 U. S. 131; *New Orleans* v. *Water Works Co.*, 142 U. S. 79; *Snow* v. *United States*, 118 U. S. 346; *Swearingen* v. *St. Louis*, 185 U. S. 38; *Tiger* v. *Western Invest. Co.*, 221 U. S. 286; *United States* v. *Celestine*, 215 U. S. 278, 290; *United States* v. *Dick*, 208 U. S. 340; *United States* v. *Fisher*, 2 Cranch, 358; *United States* v. *Forty Gallons of Whiskey*, 93 U. S. 188; *United States* v. *Lynch*, 137 U. S. 280; *United States* v. *Perrin*, 232 U. S. 478; *United States* v. *Sandoval*, 231 U. S. 28; *United States* v. *Wright*, 229 U. S. 226; *Wiggan* v. *Connolly*, 163 U. S. 56.

Mr. Justice Pitney, after making the foregoing statement, delivered the opinion of the court.

This direct appeal is taken under § 238, Jud. Code (act of March 3, 1911, c. 231, 36 Stat. 1087, 1157), which allows such an appeal (*inter alia*) "in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question." Our jurisdiction is invoked upon three grounds: (a) that the construction or validity of Article VII of the Treaty of 1855 is drawn in question; (b) that the construction or application of the Constitution is

involved; (c) that the construction of the Treaties of 1865 and 1867 is drawn in question. There is a motion to dismiss, based upon the ground that none of these contentions is well founded. We think the motion must be denied. The court below, in overruling the demurrer, based its decision upon the ground that the treaty of 1855 was necessarily repealed by the admission of the State of Minnesota into the Union upon an equal footing with the original States. This decision was based upon the bill as originally framed, but the amendments made no change affecting this ground of decision; and it is evident from the record that in granting the final decree the court adhered to the view expressed in overruling the demurrer. It is insisted by appellants, with some force, that this view was based upon grounds that involved the construction or application of the Constitution of the United States; and that for this reason the direct appeal lies. We find it unnecessary to consider the point, since it seems to us that the entire case for complainants rests at bottom upon grounds that involve the construction of the three treaties referred to, especially that of 1855.

The bill, either in its original or its amended form, did not expressly assert as a ground for relief that the treaty of 1855 had been repealed, in whole or in part, by the admission of the State. On the contrary, relief was prayed upon the ground that the second clause of Article VII (that which related to the liquor traffic and was to remain in force until otherwise provided by Congress) applied only to the ceded territory, and not to the reservations set apart within that territory; that by the Treaty of 1865 those reservations were ceded to the United States, and ceased to be Indian country in any sense; and that by the subsequent cession in the Treaty of 1867 the reservation of 1865 in turn was vested in the United States, and therefore ceased to be Indian country; and, finally, that Article VII of the treaty of 1855 had expired at the time of

the acts complained of in the bill (1910) by virtue of the provisions of the act of January 14, 1889, and the cessions made to the United States by the Chippewas of Minnesota pursuant to that act, and because of the changes wrought by time in the character of the territory included in the Treaty of 1855 and the status of the Indians therein. These grounds of relief are reiterated in the amended bill, and the averments of the amended answer are calculated to meet them. And the principal force of the arguments on both sides is addressed to the construction of the several treaties referred to. For this reason, if for no other, the direct appeal is well taken.

Upon the merits, we may well begin with the disputed portion of the Treaty of 1855:

"Article VII. The laws which have been or may be enacted by Congress, regulating trade and intercourse with the Indian tribes, to continue and be in force within and upon the several reservations provided for herein; and those portions of said laws which prohibit the introduction, manufacture, use of, and traffic in, ardent spirits, wines, or other liquors, in the Indian country, shall continue and be in force, within the entire boundaries of the country herein ceded to the United States, until otherwise provided by Congress."

The reference to previous laws clearly points to the act of June 30, 1834, entitled "An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers" (c. 161, 4 Stat. 729), and kindred acts. The act of 1834 was a revision of previous enactments, and contains many provisions for the regulation of trade and intercourse. Its twentieth and twenty-first sections (4 Stat. 732) prohibit the introduction or manufacture of, or traffic in, spirituous liquor or wine within the Indian country. From them, §§ 2139, 2140, and 2141, Rev. Stat., were derived.

By the first section of the act of 1834, the term "Indian

country" was defined, for the purposes of that act, as meaning land to which the Indian title had not been extinguished. At the making of the treaty, therefore, the restriction respecting the liquor traffic was in force within the ceded area, because until then the Indian title had not been extinguished. It was the evident purpose of Article VII to continue the restriction in force in the ceded territory, notwithstanding the extinguishment of the Indian title. Such stipulations were not unusual. A contemporaneous treaty with the Winnebagoes contained a similar one. 10 Stat. 1172, 1174, Article VIII. And it has been uniformly recognized that such stipulations amount in effect to an amendment of the statute, so as to make the restriction effective throughout the ceded territory. *United States* v. *Forty-three Gallons of Whiskey*, 93 U. S. 188, 196; *Bates* v. *Clark*, 95 U. S. 204, 208.

The fundamental contention that underlies the entire argument for complainants is that the first part of Article VII had for its object that the laws of Congress, present and future, regulating trade and intercourse with the Indian tribes, were to continue and be in force within the reservations created by the treaty; while the latter portion of the Article had for its object to keep in force in the ceded country—which, it is said, excludes the reservations—those portions of the laws that prohibited the introduction, manufacture, use of, and traffic in ardent spirits, etc., in the Indian country until otherwise provided by Congress; the particular insistence being that the latter clause applies merely to the so-called ceded territory, and not to the lands included within the reservations.

With this construction of the treaty we cannot agree. We think it rests upon a misconception of the fair import of the terms employed in Article VII, whether considered alone or together with the context, and fails to give due effect to the reason and spirit of the stipulation.

It seems to us that in the qualifying clause—"within

the entire boundaries of the country herein ceded to the United States";—the words "entire boundaries" are equivalent to "outer boundaries," and therefore include the reservations that lie within. And this agrees with the context; for, if we turn back to see what is "herein ceded," we find, that by the terms of Article I the cession is of all the right, title, and interest of the Indians in the lands owned and claimed by them included within designated boundaries (this being the great tract in question), and then, in a separate clause, a relinquishment and conveyance of all right, title, and interest of the Indians in any other lands in the Territory of Minnesota or elsewhere. There is here no suggestion that the reservations are excepted out of the cession. On the contrary, Article I in terms vests the Indian title in the United States as to all the described lands, including the reservations mentioned in Article II. The latter article reserves a number of comparatively small and isolated tracts "for the permanent homes of the said Indians." Of these, all are within the outer boundaries of the cession excepting the Mille Lac Reservation, which lies outside. Reading the two articles together, it is evident that the framers of the treaty intended that the reservations themselves should become the property of the United States, subject only to a trust for the occupancy of the Indians. This is placed beyond controversy when we observe that by the latter part of Article II it was provided that the President of the United States might cause the reservations or portions thereof to be surveyed; assign a reasonable quantity, not exceeding eighty acres in any case, to each head of a family or single person over twenty-one years of age for his or their separate use; issue patents for the tracts so assigned, which tracts were to be exempt from taxation, levy, sale, or forfeiture, and not to be aliened or leased for a longer period than two years at one time, unless otherwise provided by the legislature of the State with the

assent of Congress; not to be sold or aliened in fee for a period of five years after the date of patent, and not then without the assent of the President; and that prior to the issue of the patents the President might make rules and regulations respecting the disposition of the lands in case of the death of the allottee, etc.

The subdivision of the reservations, allotments to individual Indians, and the ultimate alienation of allotments, being thus in view at the making of the treaty, it is unreasonable to give such a construction to the stipulation contained in the second portion of Article VII as would defeat its object, by removing the restriction from scattered parcels of land whenever it should come to pass that the Indian title therein was extinguished. The restriction would be of little force unless it covered the entire ceded area *en bloc*, so that no change in the situation of the reservations by way of extinguishing the residue of Indian title or otherwise should operate to limit its effect. And so, upon the whole, we deem it manifest that the second clause of Article VII dealt with the entire ceded country, including the reservations, as country proper to be subjected to the laws relating to the introduction, etc., of liquor into the Indian country until otherwise provided by Congress. It was evidently contemplated that the bands of Indians, while making their permanent homes within the reservations, would be at liberty to roam and to hunt throughout the entire country, as before. The purpose was to guard them from all temptation to use intoxicating liquors.

That it is within the constitutional power of Congress to prohibit the manufacture, introduction, or sale of intoxicants upon Indian lands, including not only lands reserved for their special occupany, but also lands outside of the reservations to which they may naturally resort; and that this may be done even with respect to lands lying within the bounds of a State, are propositions so

thoroughly established, and upon grounds so recently discussed, that we need merely cite the cases. *Perrin* v. *United States*, 232 U. S. 478, 483; *United States* v. *Forty-three Gallons of Whiskey*, 93 U. S. 188, 195, 197; *Dick* v. *United States*, 208 U. S. 340.

And we cannot agree with the District Court that Article VII of the treaty of 1855 was repealed by the Minnesota Enabling Act, or by the admission of that State into the Union upon equal terms with the other States. Neither the Enabling Act nor the Act of Admission contains any reference to the treaty, although the latter was so recent that it can hardly have been overlooked. The court seems to have considered that the continued existence of Article VII, so far as it prohibited the introduction, manufacture, and sale of liquors within the ceded country outside of the reservations, was inconsistent with the "equal footing" clause of the Enabling and Admitting Acts. That there is no such inconsistency results very plainly, as we think, from the reasoning and authority of the cases above cited. The court deemed that *United States* v. *Forty-three Gallons of Whiskey*, *supra*, and *Dick* v. *United States*, *supra*, were distinguishable upon the ground that in each of those cases the treaty under consideration was made after the State had been admitted into the Union. But if the making of such a treaty after the admission of the State is not inconsistent with the "equal footing" of that State with the others—as, of course, it is not—it seems to us to result that there is nothing in the effect of "equal footing" clauses to operate as an implied repeal of such a treaty when previously established.

In *Ex parte Webb*, 225 U. S. 663, we had to deal with the effect of the Oklahoma Enabling Act (June 16, 1906, c. 3335, 34 Stat. 267) upon a previous statute (act of March 1, 1895, c. 145, § 8, 28 Stat. 693, 697), which prohibited (*inter alia*), the "carrying into said [Indian] Terri-

tory any of such liquors or drinks," in view of the fact that the Enabling Act itself required that the constitution of the new State should prohibit the manufacture, sale, or otherwise furnishing of intoxicating liquors within that part of the State formerly known as the Indian Territory; and we held that in view of the existing treaties between the United States and the Five Civilized Tribes, and because the Enabling Act and the constitution established thereunder dealt only with the prohibition of the liquor traffic within the bounds of the new State, the act of 1895 remained in force so far as pertained to the carrying of liquor from without the new State into that part of it which was the Indian Territory.

In *United States* v. *Wright*, 229 U. S. 226, we held that the prohibition against the introduction of intoxicating liquors into the Indian country found in § 2139, Rev. Stat., as amended by the acts of July 23, 1892, c. 234, 27 Stat. 260, and January 30, 1897, c. 109, 29 Stat. 506, was not repealed, with respect to intrastate transactions, by the Oklahoma Enabling Act, in spite of the provision respecting internal prohibition contained therein as already mentioned.

Upon the whole, we have no difficulty in concluding that Article VII of the Treaty of February 22, 1855, was not repealed by the admission of Minnesota into the Union.

We come, therefore, to the principal contention of complainants and appellees, which is that the Article was repealed by the effect of the Treaties of 1865 and 1867. The argument in support of this contention may be outlined as follows: that by the earliest of the three treaties the several bands of Indians ceded to the United States the great tract of approximately 21,000 square miles, but excepted from that cession the several reservations created for the Mississippi bands and for the Pillager and Lake Winnibigoshish bands; that when the Treaty of 1865 was

made the Mississippi bands were the owners of their reservations within the exterior limits of the cession of 1855, which reservations were not covered by the second portion of Article VII, but were subject to all of the laws of the United States regulating commerce and intercourse with the Indian tribes, simply because of being Indian country in fact; that by the Treaty of 1865 the Mississippi bands ceded outright to the United States these reservations, and in return the United States ceded to them the tract of territory already mentioned (including Bemidji and the country surrounding it), excepting those portions included within the reservations of the Pillager and Lake Winnibigoshish bands; and that when, in 1867, in return for the White Earth reservation, the Mississippi Chippewas receded to the United States the greater portion of the tract set apart for them in 1865, they ceded the same title and the same right and power over the lands that the three original tribes would have had; that is to say, they ceded them free and clear of Article VII of the Treaty of 1855.

It will at once be observed that the argument rests at bottom upon the erroneous construction to which we have already called attention, viz., that the second portion of Article VII did not apply to the reservations that were within the exterior limits of the ceded territory. We repeat that, in our opinion, the restriction applied to all the territory that was included within the terms of the cession; as much to those portions set apart for reservations as to the surrounding territory. There was nothing in the Treaty of 1865, therefore, to make the receded reservations unrestricted territory; nor was there anything in the Treaty of 1867 to remove the restriction from the territory then receded. Reading the series of treaties together, it is plain enough, we think, that the contracting parties, in all that was done, were resting upon the plain language of the second part of Article VII, which declared that the laws relat-

ing to the introduction, etc., of liquor in the Indian country should continue in force within the entire boundaries of the country in question until otherwise provided by Congress.

Finally, it is contended that Article VII of the Treaty of 1855 had been superseded at the time of the acts complained of in the bill (1910), by virtue of the provisions of the Nelson Act of January 14, 1889, c. 24, 25 Stat. 642, and the cessions made to the United States by the Indians pursuant to that act, and by reason of the change in the character of the territory included in the Treaty of 1855 and the status of the Indians therein.

As already pointed out, this act provided that Commissioners to be appointed by the President should negotiate with the different bands of Chippewas in the State of Minnesota for the complete cession and relinquishment of their title and interest in all their reservations in the State, except so much of the White Earth and Red Lake reservations as was not required for allotments, and that acceptance and approval of such cession and relinquishment by the President should be deemed full and ample proof of the cession and should operate as a complete extinguishment of the Indian title without other or further act or ceremony.

From the averments of the amended bill and answer it is not easy to gather a precise statement of the present situation of the Indian lands and of the Indians themselves, so far as it affects the question before us. Some reference is made to the situation at the Red Lake reservation; but since it is not clear that the restriction contained in the Treaty of 1855 was intended for the protection of the Indians within that reservation, we prefer to confine our attention to the situation as it existed in 1910 within the boundaries of the great tract that was the subject of the cession of 1855. Within those bounds there would seem to be remaining only fragments of the White Earth

and Leech Lake reservations; both reservations being in process of allotment under the acts of February 8, 1887, c. 119, 24 Stat. 388, and of January 14, 1889, c. 24, 25 Stat. 642, and amendatory acts. Of the lands that have been allotted, a considerable portion are still held in fee by the United States, and are non-alienable by the allottees until the expiration of the trust period. Upon the White Earth reservation, and also at Leech Lake, the Government maintains an Indian Agency and Superintendent, as well as Indian schools. At the White Earth Agency, 5,600 Indians are carried upon the annuity rolls; at Leech Lake, 1,750 Indians. The majority of these reside upon lands embraced within the original reservation, and they are the same Indians, or descendants of the same, that were parties to the treaties of 1855, 1865, and 1867. In consequence of their elevation to the plane of citizenship by the operation of the allottment acts, tribal relations have for most purposes ceased to exist, but are recognized for the purpose of the distribution of annuities under the Nelson Act. And it is admitted that for purposes of business, pleasure, hunting, travel, and other diversions, these Indians traverse parts of the region comprised in the cession of 1855, outside of the reservations, and thus visit the towns, villages, and cities in the territory, including Bemidji. On the other hand it is admitted that their visits to Bemidji are infrequent, and that there are no Indian habitations within a range of twenty miles in any direction from that city. And, as pointed out in the prefatory statement, the diminished Red Lake reservation is admittedly surrounded by a strip of land, approximately fifteen miles in width, which never was subject to the Treaty of 1855, and upon which saloons are maintained in close proximity to that reservation. This strip extends along the northerly boundary of the cession of 1855, which is perhaps ten or twelve miles north of Bemidji.

The argument for treating the restriction of 1855 as no

longer in force rests not upon any denial of the fact that there are some thousands of Indians at the White Earth and Leech Lake agencies, who are still more or less under the guardianship of the Government, and for whose protection the liquor restriction ought to be maintained, but rather upon the fact that these Indians are surrounded by territory in which liquor is lawfully obtainable. In support of this, it is said that the former Mississippi reservations ceded to the United States in 1865 are unrestricted territory; that so much of the Leech Lake and Lake Winnibigoshish reservations as were conveyed to the United States in 1890 are such territory; that every allotment from either of these reservations as to which the trust period has expired is such territory, and that lands sold to white men in the reservations is such territory. It will be observed, again, that each of these contentions rests upon the fundamental error that the reservations mentioned in the Treaty of 1855 are not within the liquor restriction of Article VII.

In view of the interpretation we have placed upon that Article, it seems to us that the contention as to changed conditions must be based not upon the supposed fact that the tract covered by the cession of 1855 "is already dotted with wet territory," but rather upon the question whether the restriction—entered into more than half a century ago, when the country was a wilderness—ought to be treated as still in force, in view of the small number of Indians entitled to protection as compared with the large population of whites who now form the great majority of the inhabitants, and in view of the high state of civilization and development of the territory in question.

In *Perrin* v. *United States*, 232 U. S. 478, 486, we had to deal with a somewhat similar question. That was a review of a conviction for unlawfully selling intoxicating liquors upon ceded lands formerly included in the Yank-

ton Sioux Indian reservation in the State of South Dakota. The reservation was created in 1858, and originally embraced 400,000 acres. A considerable part of it was allotted in severalty to members of the tribe under the act of 1887, the allotments being in small tracts scattered through the reservation. By an agreement ratified and confirmed by Congress August 15, 1894 (c. 290, 28 Stat. 286, 314, 318), the tribe ceded and relinquished to the United States all the unallotted lands, and by Article 17 of the agreement it was stipulated: "No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858, and as afterwards surveyed and set off to the said Indians. The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement." In the ratifying act a penalty was prescribed. The ceded lands were opened to disposition under the homestead and town site laws and passed largely into private ownership, and the place at which the intoxicating liquors were sold was within the defendant's own premises in a town located upon a part of the ceded lands held in private ownership by the inhabitants, none of whom was an Indian. After overruling the contention that the restriction was invalid because the power to regulate the sale of intoxicating liquors upon all ceded lands rested exclusively in the State (citing *United States* v. *Forty-three Gallons of Whiskey*, 93 U. S. 188, and *Dick* v. *United States*, 208 U. S. 340), the opinion dealt with the further contention that the power of Congress was necessarily limited to what was reasonably essential to the protection of Indians occupying the unceded lands, and that this limitation was transcended by the provision in

question because it embraced territory greatly in excess of what the situation required, and because its operation was not confined to a designated period reasonable in duration, but apparently was intended to be perpetual. As to this the court said (p. 486):

"As the power is incident only to the presence of the Indians and their status as wards of the Government, it must be conceded that it does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis. Thus, a prohibition like that now before us, if covering an entire State when there were only a few Indian wards in a single county, undoubtedly would be condemned as arbitrary. And a prohibition valid in the beginning doubtless would become inoperative when in regular course the Indians affected were completely emancipated from Federal guardianship and control. A different view in either case would involve an unjustifiable encroachment upon a power obviously residing in the State. On the other hand, it must also be conceded that, in determining what is reasonably essential to the protection of the Indians, Congress is invested with a wide discretion, and its action, unless purely arbitrary, must be accepted and given full effect by the courts."

Although the circumstances of the present case are different, and we are here dealing with a question of obsolescence rather than of original invalidity, the language just quoted indicates the point of view from which the question should be approached. But we must not forget that the question is one, primarily, for the consideration of the law-making body; nor are we in danger of doing so, since by the very terms of the stipulation now under consideration the prohibition of the liquor traffic was to continue "until otherwise provided by Congress." We do not mean to say that if it appeared that no considerable

number of Indians remained wards of the Government within the territory in question, the courts would not be justified in declaring that since the constitutional warrant for the restriction no longer existed the restriction must expire with it. But where the question confessedly turns not upon a total, nor even upon an approximately complete, emancipation of the Indians from the Federal guardianship, but upon their unimportance as compared with the interests of the population at large, we think the question is legislative rather than judicial.

Indeed, it has only recently been under consideration by Congress. On February 17, 1911 (Senate Doc. No. 824, 61st Cong., 3d Sess., Vol. 85), the President, in a special message, called attention to the situation in Minnesota, resulting from the operation of the old Indian treaties under present conditions; and with respect to the area ceded by the Chippewas in 1855, he stated: "The records of the Indian Bureau show that there are within said area, under the jurisdiction of the superintendents of the White Earth and Leech Lake Reservations, 7,196 Indians who can be amply protected by limiting the territory as to which said treaty provisions shall remain in force and effect to the area within and contiguous to said reservations, particularly described as follows: . . . I therefore recommend that Congress modify the article of said treaty quoted above so as to exclude from the operations of its provisions all of the territory ceded by said treaty to the United States, except that immediately above described."

That Congress has not yet acted upon this recommendation is evidence that the problem is not so entirely obvious of solution that it can be judicially declared to be beyond the range of legislative discretion.

Since it must be admitted that complainants have no ground of relief against defendants if the restriction remains in force at Bemidji, as we hold that it does, it follows

that the decree of the District Court should be reversed, and the cause remanded with directions to dismiss the bill.

Decree reversed.

MR. JUSTICE MCKENNA and MR. JUSTICE LURTON dissent upon grounds expressed in the opinion of the District Court, reported in 183 Fed. Rep. 611.